Petition

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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81-631

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

TRUONG DINH HUNG,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Attorney General have authority, without a warrant, to:

   a) Tap a telephone and bug a living room of a private home;

   b) Seize a package of books and papers bound for a foreign place, in the hands of a private courier whom the sender reasonably believes is a friend?

Even if such authority exists, may the evidence obtained be admitted in a federal criminal trial?

2. Under the espionage statutes, 18 U.S.C. §§ 794(a), 792(c):

   a) Must "national defense" be limited to "a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness," *Gorin v. United States*, 312 U.S. 19, 28 (1941), or may it be expanded to include "information or sources or both" relating only to gathering of diplomatic information;

   b) May a defendant be convicted for transmission of information which is in the public domain;

   c) May a jury be instructed both that the classified status of the material is relevant and that the propriety of the classification is irrelevant?

3. May 18 U.S.C. § 641, viewed in light of its legislative history, be used to prosecute and punish alleged conversion of government "information"; if so, does § 641 violate the first amendment on grounds of vagueness and overbreadth?

4. May the harmless error rule be applied to governmental withholding of impeachment material as to the

government's principal witness' testimony concerning a crucial element of the espionage offenses, where counsel repeatedly requested the concededly withheld material?

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IN THE

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OCTOBER TERM, 1981

TRUONG DINH HUNG,

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UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Truong Dinh Hung, known to his friends in the United States as David Truong, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, which affirmed the judgment of conviction of the United States District Court for the Eastern District of Virginia sentencing Petitioner to imprisonment of fifteen years. Petitioner was convicted of six offenses after a jury trial: conspiracy to commit espionage (18 U.S.C. § 794(a)); conspiracy to violate 18 U.S.C. § 641, 50 U.S.C. 783(b) and (c) (18 U.S.C. § 371); espionage (18 U.S.C. § 794

(a)); converting government information without authority (18 U.S.C. § 641); acting as a foreign agent without notification to the Secretary of State (18 U.S.C. § 951); and unlawful transmission of defense information (18 U.S.C. § 793(e)). Petitioner is enlarged on bail. *See United States v. Truong*, 439 U.S. 1326 (1978).

OPINIONS BELOW

The district court's pretrial opinion concerning the fourth amendment issues is reprinted as Appendix A and reported as *United States v. Humphrey*, 456 F. Supp. 51 (E.D. Va. 1978). The first opinion of the court of appeals affirming in part, remanding in part and retaining jurisdiction, is reprinted as Appendix B and reported as *United States v. Truong*, 629 F.2d 908 (4th Cir. 1980). Upon remand concerning *Jencks* and *Brady v. Maryland* issues, the district court wrote an opinion, unpublished and reprinted as Appendix C. Upon appeal from the remand, the court of appeals affirmed, in an opinion as yet unpublished and reprinted as Appendix D.

JURISDICTION

The decision of the court of appeals was rendered on July 14, 1981. Justice Brennan extended the time for filing of this petition to September 29, 1981.

This court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

David Truong came to this country in 1965 and attended Stanford University, where he had a distinguished record. Active in seeking an end to the war, he has continued to work for normalization of relations between the United States and Viet Nam. In 1976 David

Truong was working and living in Washington, D.C., where he met Dung Krall. Mrs. Krall, the daughter of a diplomat of the Provisional Revolutionary Government of South Viet Nam, was an agent of the Central Intelligence Agency. In April, 1977, Mrs. Krall carried a package to Paris given her by David Truong. The package was examined by the FBI, resealed, and taken to Paris where it was delivered.[1] The package was said to contain, in addition to books and other reference materials, copies of diplomatic and economic information in the form principally of cable traffic from American consular offices in Southeast Asia, from which the classification and origination markings had been removed. No warrant or authorization of the Attorney General was sought or obtained prior to the opening of the package.[2]

The telephone in David Truong's apartment was tapped and monitored twenty-four hours a day for two hundred and sixty-eight days beginning on May 11, 1977. On May 27, 1977, David Truong's apartment (Apt. 201, 2000 F Street, Washington, D.C.) was broken into and a microphone installed. The device operated continuously for two hundred and fifty-five days. The intrusion into David Truong's home was authorized by the Attorney General; no judicial authorization was sought or obtained for either the tap or "bug."

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[1]Truong denied telling Krall to deliver the package to anyone other than Giao, a journalist. She took it, so she said, to Vietnamese government officials.

[2]The package consisted of a large manila envelope containing a plastic bookbag that was doubled over at the top and secured with twine. The papers were secured inside the bookbag by strips of heavy opaque paper which covered approximately 75% of their surface.

As a result of the electronic surveillance of David Truong's home, *United States v. Truong*, 629 F.2d 908, 912 (4th Cir. 1980), app. 28a, the government learned that he was receiving documents from Ronald Humphrey. Humphrey, a watch officer at the United States Information Agency, made copies of diplomatic cable traffic, removed the classification and origination markings, and gave them to David Truong. On June 23, 1977, David Truong gave Dung Krall a second package of materials similar to the first. The package was opened by the government without a warrant but with the authorization of the Attorney General, reviewed, and permitted to go on to Paris.

At trial, Dung Krall, Ronald Humphrey and David Truong testified. Mrs. Krall testified to a number of conversations she allegedly had with Vietnamese diplomatic personnel about the materials she had delivered, and provided the sole evidentiary link between David Truong and Vietnamese government officials. David Truong denied that the materials were destined for or intended for use by Vietnamese government officials. The materials were, he testified, part of an exchange of information between himself and other young Vietnamese interested in writing and publishing about post-conflict relations between the United States and Viet Nam. He stated his belief that Humphrey would not give him materials which he had no right to have. Testimony was presented on the issues of "national defense," "advantage to a foreign nation" and "injury to the United States" by both government and defense.

Both the trial court and the Fourth Circuit found the warrantless intrusion into David Truong's home to be justified pursuant to a "foreign intelligence exception" to the warrant requirement of the fourth amendment

up to July 20, 1977, but suppressed evidence so obtained after that date finding that the investigation had become "primarily" a criminal investigation. *United States v. Truong, supra,* at 916, app. 41a-42a.

The case was, however, remanded to the district court to permit the examination of documents containing prior statements of Krall not furnished to the defense at trial. As to certain of these documents, recounting verbatim a conversation Krall had testified to at trial but omitting highly damaging testimony (that the head of the Vietnamese mission in Paris had told Krall that David Truong was one of "our people in Washington"), the trial court acknowledged that the defense could validly complain that they were not provided pursuant to the Jencks Act but that the error was harmless. The Fourth Circuit affirmed.

REASONS FOR GRANTING THE WRIT

I.

SEARCH ISSUE

The question starkly presented by this record is whether petitioner's "house . . ., papers and effects" can be searched, by order of the Attorney General, without a warrant or other judicial process. The purported justification for the incursions is national security; the fruits of the searches were used in evidence. The opinion of the Fourth Circuit addresses the question reserved in *United States v. United States District Court,* 407 U.S. 297 (1972) (*Keith*), i.e., the issues raised when the government claims that the warrantless searches are justified by the supposed "activities of foreign powers or their agents," *id.* at 321-322.

The issue of warrantless search has three aspects: (1) The massive intrusion into the petitioner's home by electronic surveillance, for which the claim is made that a "foreign intelligence exception" to the Fourth Amendment warrant requirement applied; (2) Searches of a package and a letter for which the same claim is advanced; and (3) The search of a package containing documents of the type supporting the espionage conviction for which the courts below concluded that no search warrant was required because the petitioner had not made a sufficient effort to "conceal the documents from view" and the likelihood of inspection at national boundaries. *United States v. Truong*, 629 F.2d at 917, app. 44a.

Importance of the Search Issues

The issue presented has never been before the Court. The cases from other circuits presenting similar issues are in conflict, and have been disavowed, in relevant part, by the Fourth Circuit here. In *United States v. Butenko*, 494 F.2d 593 (3d Cir.) (en banc), *cert. denied*, 419 U.S. 881 (1974), the warrantless intrusion into the petitioner's home was conceded by the government to have been illegal, and the Third Circuit accepted the concession. *Id.* 494 F.2d at 597, 608, 617. In *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974), and *United States v. Clay*, 430 F.2d 165 (5th Cir. 1970), *rev'd on other grounds*, 403 U.S. 698 (1971), petitioners had apparently wandered into a zone of electronic search directed at others; the records in those cases suggest that embassy premises may have been involved. In any case, the searches had the most persuasive arguable justification, had not been initiated as an effort to gain evidence about those peti-

tioners,[3] and in any case were of no possible relevance to the charges against them. The rationale of both *Brown* and *Butenko* relied on explicit findings of the district courts that the surveillances there at issue were not initiated or directed against the defendants and were not of premises in which they had any interest. *United States v. Butenko*, 318 F. Supp. 66, 72 (D. N.J. 1970); *United States v. Brown*, 317 F. Supp. 531, 536 (E.D. La. 1970). We do not concede that any of these considerations are dispositive of the merits in those cases, but they may have to do with the issue of whether a given record presents issues in a fashion which merits a decision to grant certiorari.

In this case, the Executive Branch deliberately decided to invade the "house," "papers" and "effects" of petitioner, to do so without a warrant, and to bring the fruits of such incursions to court in a prosecution of petitioner for the offenses which they suspected had been committed. No precedent supported such claim of authority. The supposed foreign intelligence exception, on which the government relies, had been rejected by the District of Columbia Circuit in *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (en banc) (plurality opinion) (dicta), *cert. denied*, 425 U.S. 944 (1976).[4] The excep-

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[3] *Cf., United States v. Kahn*, 415 U.S. 143 (1974). The claimed power to prosecute the target of a search conducted pursuant to a "foreign intelligence exception" to the warrant requirement with the product of that search is far more than the assertion of power to conduct warrantless foreign intelligence surveillance *per se*. *Cf. Frank v. Maryland*, 359 U.S. 360, 365 (1959); *United States v. Coplon*, 185 F.2d 629 (2d Cir. 1950) (L. Hand), *cert. denied*, 342 U.S. 920 (1952).

[4] Although all transfers of documents between Truong and Humphrey, and all but one contact between Truong and Krall, [footnote continued]

tion to the warrant requirement found in *Butenko*, besides being inapplicable to the concededly illegal intrusion into the defendant's home, was expressly limited to instances where the surveillance was "solely" for the purpose of gathering foreign intelligence information, 494 F.2d at 605 and 606. Here, the Fourth Circuit found the *Butenko* "solely" test to be "unacceptable." *United States v. Truong*, 629 F.2d at 915, app. 40a.

In short, the government in this case deliberately sought the very confrontation between executive power and constitutional mandate which is now presented on this record.

The Foreign Intelligence Surveillance Act And This Case

The government has argued at times that the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1801, essentially mooted the issue here presented, in that had the case arisen after the passage of that Act, a warrant would surely have been sought for the wiretap and

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took place in the District of Columbia, the sole contact between Truong and Krall in Virginia was made the basis for venue. On that occasion Krall, a government agent, persuaded Truong to come to Virginia. This theory of venue resulted, for example, in charging the completion of a theft offense, 18 U.S.C. § 641, *see* point III *infra*, at the moment the "stolen" information was transferred back to the government (i.e., Krall). This absurd and improper result, *see United States v. Anderson*, 328 U.S. 699 (1946), was assuredly a consequence of the critical view that the District of Columbia Circuit would have taken of the massive intrusion, without a warrant, into the home of David Truong *in the District of Columbia*. The anomalous result, that the Fourth Circuit sanctions massive warrantless surveillance in the District of Columbia on grounds that the District of Columbia Circuit had previously disapproved in *Zweibon*, bespeaks the need for review by the Court.

"bug."[5] This line of argument appears to be a backhanded concession that serious fourth amendment issues are present.

On analysis this argument proves its contrary. At no point in its brief in the Fourth Circuit did the government acknowledge that it is bound by FISA should the executive find its requirements to be an undue frustration and a "procedural hurdle," the grounds purportedly obviating the warrant requirement in this case. *United States v. Truong*, 629 F.2d at 913, app. 35a. Moreover, the Fourth Circuit opinion rests on the finding of an executive constitutional "competence," relying on *United States v. Curtiss-Wright*, 299 U.S. 304 (1936), a concession to the executive that would justify ignoring the requirements of FISA as well.

Here, the intrusion into the petitioner's home was based on a prior warrantless package search. The fruits of further searches of a second package and a letter were introduced into evidence. The United States Foreign Intelligence Surveillance Court has decided that it has

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[5]The legislative history of FISA refutes any notion that it can be seen as a form of legislative approval of the claimed foreign intelligence exception to the warrant requirement of the fourth amendment.

> S. 1566 is designed therefore to curb the practice by which the executive Branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it. [Report of the Senate Committee on the Judiciary, No. 95-604, 95th Cong., 1st Sess., 8 (1977).]

The Senate Report went on to express the view that the *Butenko* decision had not followed the methodology of *Keith* and erred in applying a subjective balancing test to determine if foreign security surveillance should be excepted from the warrant requirements.

Report of the Senate Committee on the Judiciary, No. 95-604, *supra*, at 14-15.

"no jurisdiction to authorize physical searches or the opening of mail." *In The Matter Of The Application Of The United States For An Order Authorizing The Physical Search Of Non-residential Premises And Personal Property* (June 11, 1981) (Hart, J.), slip opinion at p. 6.[6] In that proceeding, the executive stated that "such searches will continue to be reviewed and approved by the Attorney General pursuant to the standards and authority delegated by the President." Brief of the Office of Intelligence Policy & Review, U.S. Department of Justice, June 3, 1981, at p. 2.

Sources And Scope Of Executive Power

The Fourth Circuit, rejecting the holding in *Butenko* that "prior judicial authorization was not required since the district court found that the surveillance . . . [was] 'conducted and maintained solely for the purpose of gathering foreign intelligence information'", 494 F.2d at 605, substitutes the test that "the executive should be excused from securing a warrant only when the surveillance is conducted 'primarily' for foreign intelligence reasons." 629 F.2d at 915. If the surveillance has a "foreign connection," the executive would then be able to ignore the warrant requirement of the Fourth Amendment. In the substitution of a single word lies an unprecedented sanction of executive authority to proceed with searches without prior judicial approval and to utilize the results in criminal prosecutions in the courts. Such a result is worthy of review by the Court.

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[6]Determination of the constitutional issue here would be of certain assistance to the Foreign Intelligence Surveillance Court; the conflict in the courts of appeals on this issue leaves its constitutional responsibility uncertain.

No statute supports the government's claim. In his testimony at a pretrial hearing, the Attorney General claimed that he was acting under "counterintelligence" authority to be found in 28 U.S.C. § 533.[7] In *Keith*, the *President's* statutory claim under 18 U.S.C. § 2511(3) was rejected; now a claim is made under a far more general provision on behalf of the President's subordinate.[8]

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[7] **§ 533. Investigative and other officials; appointment**

The Attorney General may appoint officials—

(1) to detect and prosecute crimes against the United States;

(2) to assist in the protection of the person of the President; and

(3) to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General.

This section does not limit the authority of departments and agencies to investigate crimes in the United States when investigative jurisdiction has been assigned by law to such departments and agencies.

[8] The government has argued that authority for the "foreign intelligence exception" is to be found in the reservation of powers in 18 U.S.C. § 2511(3). Such reliance is undercut by the reading of § 2511(3) adopted in *Keith*, 407 U.S. at 303-308. Congress expressly listed "espionage" among the 18 U.S.C. § 2514 offenses for which a warrant could be obtained.

Reliance on the history of Presidential authorization of warrantless foreign intelligence wiretapping to justify its use here is misplaced; the original Presidential authorization to the Attorney General, *see Keith*, 407 U.S. at 310 n.10, contained the following observation:

> I have agreed with the broad purpose of the Supreme Court decision relating to wire-tapping in investigations. *The Court is undoubtedly sound both in regard to the use of evidence secured over tapped wires in the prosecution of citizens in criminal cases*; and is also right in its opinion that under ordinary and normal circumstances wiretapping by Government agents should not be carried on for the excellent reason that it is almost bound to lead to abuse of civil rights.

Memorandum of May 17, 1940 of President Roosevelt to Attorney General Jackson. [Emphasis added.]

Whether the Attorney General has so awesome a power under so terse a statute is, we would submit, doubtful. *Compare, Kent v. Dulles,* 357 U.S. 116 (1958), *Gutknect v. United States,* 396 U.S. 295 (1970), with *Haig v. Agee,* 69 L.Ed.2d 640 (1981). Under contemplated changes to Executive Order 12036, the regulations governing the use of the claimed foreign intelligence authority of the President, it is further proposed to limit the protection of privacy "to the extent consistent with the intelligence needs of the United States" and to further delegate the authority to use "techniques" for which a warrant would otherwise be required "to the head of any agency within the Intelligence Community."[9]

The minimum constitutional standard proposed by the Fourth Circuit works a quiet reversal of *Keith,* as shown by this record. The "foreign connection" requirement here purportedly justified breaking into the home of a resident of the District of Columbia.[10] The conversations recorded over a period of eight months on a home telephone dealt, almost exclusively, with "domestic" subjects

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[9]The relevant sections of the proposed Executive Order 12036, which have not as yet been adopted, are reprinted at App. E.

[10]David Truong's status as an alien is not relevant to the issues here. We are talking about "houses, papers and effects"; and specifically about David's house, Apart. 201, 2000 F Street, N.W., Washington, D.C. This is not a border search, *see United States v. Brignoni-Ponce,* 422 U.S. 873 (1975), nor an administrative search, *see Abel v. United States,* 362 U.S. 217 (1960). The fourth amendment contains no limitation respecting aliens *as such*; any limitation would have to do with classification for administrative purposes justifying limited departures from traditional fourth amendment values for limited purpose searches. *Cf. See v. Seattle,* 387 U.S. 541 (1967). This is not the issue here.

and conversants. Even less satisfactory is the distinction drawn by the supposed primacy of "intelligence-gathering," as opposed to "prosecuting," in the subjective intent of the Executive prior to July 20, 1977.[11] The Attorney General gave the following answer to the question of petitioner's counsel whether, at the time he authorized the warrantless surveillance, he thought he "had a case of espionage on his hands?":

> I felt certain we did, some kind of crime. I'm just a person from Georgia, but I thought if you took documents out of the State Department, you're doing something wrong. I wasn't certain what it was. I didn't look up the law, but I was interested in catching whoever was doing it.

Testimony of Griffin B. Bell, Hearing of March 20, 1978, p. 26.

To the same effect, memoranda provided to the Attorney General by the Justice Department staff at the time of the authorization were headed by references to the very statutes under which petitioner was later prosecuted. An attorney general "interested in catching" someone has been, to date, disqualified *per se* from authorizing a search. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Johnson v. California*, 333 U.S. 10 (1948)

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[11]The distinction between "intelligence-gathering" and "criminal investigation" is by itself not dispositive of the constitutional question, even were the categories not, as on this record, completely intermingled:

> Official surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy of speech.

Keith, supra, 407 U.S. at 320.

The April Package Search

The search of the package given to Dung Krall in April, 1977, was not made pursuant to any claim of executive foreign intelligence authority or prior judicial authorization. Documents from the package were admitted into evidence. The Fourth Circuit's finding that David Truong had no legitimate expectation of privacy because of an insufficient wrapping and the likelihood of inspection on crossing national boundaries, *United States v. Truong*, 629 F.2d at 917, app. 44a, creates a new exception to the warrant requirement worthy of review.

The documents were inside a tied bookbag, itself inside a large manila envelope. The manila envelope was unsealed; a fact relied upon in the opinions below. In *United States v. Ross*, No. 79-1624, slip op. (D.C. Cir. March 31, 1981) (en banc), *cited with approval* in *Robbins v. California*, 69 L.Ed.2d 744, 751 (1981), the District of Columbia Circuit rejected the argument that sealing a paper container was a precondition to protection of an individual's privacy interests under the fourth amendment. The extension of the postal entry search exception of *United States v. Ramsey*, 431 U.S. 606 (1977), to the examination of papers entrusted to a friend for eventual overseas delivery represents a further extraordinary elision of the warrant requirement. Strict adherence to fourth amendment standards is required for searches of books and documents, presumptively protected by the first amendment. *Stanford v. Texas*, 379 U.S. 476, 486 (1965).

The Core Values Protected By The Fourth Amendment Are In Question

The structure of the fourth amendment is stark and simple:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Here, as on numerous recent occasions, the primacy of the word "reasonable" is asserted over the Warrant Clause. *United States v. Truong*, 629 F.2d at 916, app. 43a. The notion that "reasonable" is a universal solvent which can cleanse a warrantless search of taint was emphatically rejected by the Court in *Chimel v. California*, 395 U.S. 752 (1969), and in *Keith, supra.* The government's contention that, other than as to *houses and private communications*, "reasonableness" supersedes the Warrant Clause, was no less emphatically rejected in *United States v. Chadwick*, 433 U.S. 1 (1977). As the government conceded in *Chadwick*, the Warrant Clause was adopted most specifically to govern intrusions into the home: "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Keith, supra*, 407 U.S. at 313.

Now it is asserted that national security can do that which exigency (*Mincey v. Arizona*, 437 U.S. 385 (1978)) or tradition (*Payton v. New York*, 445 U.S. 573 (1980)) could not. The Court has warned against the assertion of executive power, under the emotive force of national security interests, beyond those powers

specifically granted in Article II. "Even the war power does not remove constitutional limitations safeguarding essential liberties." *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398, 426 (1934). *See also, Robel v. United States*, 389 U.S. 258 (1967). This is not a case involving the "broad powers [of] military commanders engaged in day-to-day fighting in a theater of war." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

The origin of the Warrant Clause lay in a context where national security concerns were present; the plaintiffs in *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765), and *Wilkes v. Wood*, 19 How. St. Tr. 1153 (1763), were thought to be in league with a foreign power. The decision in *Entick* was "in the minds of those who framed the Fourth Amendment. . . ." *Boyd v. United States*, 116 U.S. 616 (1886). Nothing in the history of the amendment suggests that it was designed to be anything less than its language suggests: an absolute prohibition on the executive branch doing what the King's ministers had asserted the power to do in *Wilkes* and *Entick*.

This was the question left open in *Keith*. It is here on a record permitting informed decision.

II.

NATIONAL DEFENSE ISSUE

The transferred documents contained information of a kind that has never previously been the subject of an espionage conviction; the information was diplomatic in origin and unimportant in subject matter.[12] The trial

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[12]No prior case has sought to extend the definition of espionage, and particularly the concept "relation to the national defense," [footnote continued]

court in its charge, and the Fourth Circuit affirming, adopted a view of the espionage statutes (18 U.S.C. §§ 793 and 794) that expanded their scope beyond that regarded as constitutionally permissible by the Court in *Gorin v. United States*, 312 U.S. 19 (1941). As this novel reading of statutes that carry the most severe penalty to be found in the United States Code renders them unconstitutional as applied, the issue is worthy of review.

National Security And National Defense

The espionage statutes require for conviction that information "relating to the national defense" be transmitted. Petitioner presented witnesses who testified that the documents related to the "foreign relations" rather than "defense" of the United States. Defense witnesses further testified that the substantive information in the documents was in the public domain. The government presented through its witnesses a broad-gauge view that blurred the distinction between "national defense" and the far broader concept of "national security."[13] Not

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to the kinds of information at issue here. *Cf., e.g., United States v. Boyce*, 594 F.2d 1246 (9th Cir.), *cert. denied*, 444 U.S. 855 (1979) (top secret CIA materials concerning covert satellite data); *United States v. Dedeyan*, 584 F.2d 36 (4th Cir. 1978) (NATO resupply); *Gorin v. United States*, *supra* (Naval intelligence concerning war vessels and related matters); *United States v. Drummond*, 354 F.2d 132 (2d Cir. 1965), *cert. denied*, 384 U.S. 1013 (1966) (Naval warship data; military files); *United States v. Soblen*, 301 F.2d 236 (2d Cir.), *cert. denied*, 370 U.S. 944 (1962) (OSS data in wartime; weapons system); *Slack v. United States*, 203 F.2d 152 (6th Cir.), *cert. denied*, 346 U.S. 888 (1953) (munitions data).

[13]Executive Order 11652 defines "national security" as composed of two distinct and separate elements: national defense and foreign relations.

substantially disputing that the substantive information was in the public domain, the government contended that "sources and methods" of intelligence gathering contained in the transmitted materials were not publicly known.

The trial court adopted the government's theory in its charge to the jury and its ruling on evidence. To the definition of national defense found in *Gorin* ("a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness," 312 U.S. at 28), the trial court added a specific reference to "information or sources or both," and refused an instruction that "national defense" is limited to military matters, as distinct from "foreign relations."

In *Gorin* the Court bounded the punishable transmission of information with the same dividing line as that which divides protected speech from unprotected speech. What is added to the espionage laws is taken away from the freedom of debate, that is, from the first amendment. 312 U.S. at 23.[14]

The definition of "national defense" in *Gorin* is broad indeed; adding "sources" and foreign relations matters extends the statute beyond that point permitted by the

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[14]A similar metaphor of a "fence" between protected and unprotected conduct identical to that between conduct which is and is not subject to sanction has been used by the Court in first amendment contexts. *New York Times v. Sullivan*, 376 U.S. 254, 272 (1964) (defamation); *Roth v. United States*, 354 U.S. 476 (1957) (obscenity). The leading discussion of the espionage statutes is H. Edgar and B. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L. Rev. 929 (1973). For the relation of the espionage law and the first amendment, *see also* M. Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided In The Ellsberg Case*, 26 Stan. L. Rev. 311 (1974).

first amendment. The information transmitted was trivial and with no immediate connection to "military and naval establishments and the related activities of national preparedness."[15]

Classification And Public Domain

The trial court charged the jury that the classification of documents could be considered as bearing upon their relation to the national defense, but forbade the jury to consider defense evidence that the classifications were improper. This result improperly denies review to one who had no part in the classification process, and who might be convicted of a most serious offense on the basis of misclassification.[16] *Cf., Estep v. United States*, 327 U.S. 114, 122 (1946). (Administrative classification of defendant by draft board not final for judicial review purposes; due process implications.)

These instructions, combined with the addition to the *Gorin* definition of "sources," in effect withdrew from the jury the evidence presented by the defense that the information was in the public domain.[17] This is a full

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[15]A Central Intelligence Agency officer, on reviewing the information, had written a memorandum to the prosecution stating that to find a connection with the "national defense" would require "Jesuitical" reasoning. Tr. 2021.

[16]Indeed, given the insignificance of the documents, their classification may well have been the only plausible evidence of "relation" to the "national defense." Yet classification is based on "national security," of which "national defense" is a subcategory. *See*, Executive Order 11652. This is apart from "the fact routinely accepted in all quarters that the Executive Branch routinely abuses the power of classification." Edgar and Schmidt, *supra*, at 1066.

[17]The trial court confused the public availability of documents with the public availability of the information contained in them:

[footnote continued]

and constitutionally mandated defense. *United States v. Heine*, 151 F.2d 813 (2d Cir. 1945) (L. Hand), *cert. denied*, 328 U.S. 833 (1946).

The statute protects an interest: the interest in not having information of a certain defined character transmitted to a foreign power. The penalty it exacts is among the most severe in the criminal code. The decision as to guilt or innocence must be made free of the gratuitous (for purposes of criminal prosecution) views of anonymous classifiers and in the firm understanding that if the statutory *interest* is not infringed the defendants are not guilty of espionage.

The jury instructions in this case, and the court of appeals opinion upholding them, broaden the statutory definition of espionage and present sharply the very problems alluded to in *Gorin*.

[O]n the question of whether the information is related to the national defense, the question of whether it is in the public domain or not is only relevant if the *information and documents* which the defendants gathered were lawfully accessible, because it had been lawfully released—or for some other reason—to anyone who was willing to take the trouble to gather it."

Trial Court Charge to the Jury, p. 36. [Emphasis added.]

Gorin holds that it is "the information to be obtained" which must relate to the national defense. 312 U.S. at 27-28. The espionage laws are not designed to protect "documents," as such, but rather the information in those documents, notes and writings.

III.

THEFT OF INFORMATION ISSUE

Petitioner was convicted of violating 18 U.S.C. § 641 on the theory that he received converted government property in the form of photocopies of classified information.[18]

Although Judge Winter authored the majority opinion below, he stood alone in finding that § 641 may not be read to include classified information.[19]

The Court should consider the application of § 641 to the receipt of photocopies of classified information because such an extension of a criminal statute poses two fundamental dangers. First, as a matter of substantive criminal law, the application of the statute to photocopies of documents dispenses with one of the common law elements of conversion, *animus furandi. Compare, Pearson v. Dodd,* 410 F.2d 701 (D.C. Cir.), *cert. denied,* 395 U.S. 947 (1969) (photocopying documents is not a conversion of them), with *United States v. Girard,* 601 F.2d 69 (2d Cir.), *cert. denied,* 444 U.S. 871 (1979) (selling information obtained from the computers of the

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[18]The majority of the court below, expressed through the concurring and dissenting opinion of Judge Russell, 629 F.2d at 931, app. 77a, applied the discretionary concurrent sentence doctrine in declining to review petitioner's conviction under § 641. This, of course, does not affect this Court's jurisdiction, *Benton v. Maryland,* 395 U.S. 784, 791 (1969), and we ask the Court to consider the matter because of the importance of the issue.

[19]18 U.S.C. § 641 renders criminally liable any person who "converts to his use or the use of another, or without authority, sells, conveys or disposes of any . . . thing of value of the United States."

Drug Enforcement Administration is a conversion of government property.)[20]

Of greater importance, however, is that application of § 641 to intangible government information threatens first amendment values.[21]

The legislative history of § 641 does not consider the theft of government information. And as § 641 is written, no precise standard controls the exercise of executive discretion in deciding whether to forbid or permit the disclosure of government information. That is, the conveyance of government property comes within the scope of § 641 if it is done "without authority"; yet that term is undefined. As Judge Winter wrote:

> Thus, the vagueness of the "without authority" standard could pose a serious threat to public debate of national issues, thereby bringing the constitutional validity of § 641 into question because of its

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[20] *See also United States v. May*, 625 F.2d 186 (8th Cir. 1980) (intangible flight time in a government aircraft can be the subject of conversion); *Chappell v. United States*, 270 F.2d 274 (9th Cir. 1959) (appropriating the labor of an airman while on duty is not conversion of government property under § 641). 18 U.S.C. § 641 is a theft statute with distinct common law overtones. *Morissette v. United States*, 342 U.S. 246, 260-63 (1952). The question of what may be a subject matter of theft is discussed in Jerome Hall's *Theft, Law & Society*, c.3 (2d Ed. 1952).

[21] Of course, since the attack on § 641 is for overbreadth, interference with first amendment rights *in this case* need not be demonstrated nor need it be shown that the conduct alleged as the basis for the § 641 charge could be prosecuted under a more narrowly drawn statute. *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965); *see generally*, Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844 (1970). However, this record does reflect that Truong *was* exercising first amendment rights.

> chilling effect on the exercise of first amendment rights.

United States v. Truong, 629 F.2d at 925, app. 62a-63a.

Professor Nimmer has exhaustively canvassed the first amendment concerns present here. *See* M. Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided In The Ellsberg Case*, 26 Stan. L. Rev. 311 (1974).[22] Applied to "government information," § 641 is unconstitutionally standardless.[23] It threatens the discussion of government affairs, the "core activity" protected by the first amendment. *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). For this reason, the Court should consider the application of § 641 to "government information" presented by this case.

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[22]These concerns are now more real than hypothetical. The previous administration had taken the position that journalists who published leaked government documents would not be prosecuted under § 641. The present administration has condemned reporters who use leaked information as behaving like receivers of stolen property, *The Washington Post*, June 8, 1981, at A3, and recently announced a reversal of the guidelines promulgated by the previous administration. *The Washington Post*, Sept. 17, 1981, at A25.

[23]Moreover, recognizing a governmental property interest in information, absent a contractual agreement confessing such an interest, *see Snepp v. United States*, 444 U.S. 507 (1980), is at war with the legislative determination not to recognize a government right to copyright. *See generally* M. Nimmer, *supra*. Denial of copyright to government papers expresses the first amendment concern with unfettered debate of public issues, and is a corollary of the constitutional principle that there can be no "libel on government."

IV.

JENCKS AND BRADY ISSUE

This record presents an unprecedented extension of the "harmless error" doctrine to multiple violations of the government's duty "to present its case against the defendant fairly." *Dennis v. United States,* 384 U.S. 855, 870 (1966). In particular, finding the violation of 18 U.S.C. § 3500 (the "Jencks Act") that occurred here to be "harmless error" is not consistent with opinions of the Court that require the harmless error doctrine to be "strictly applied" in Jencks Act cases. *Goldberg v. United States,* 425 U.S. 94 (1976); *Clancy v. United States,* 365 U.S. 312 (1961).

The petitioner's conviction rests on the testimony of Dung Krall that the materials given to her reached Vietnamese government officials in Paris. At trial Krall testified that the head of the Provisional Revolutionary Government mission in Paris had told her that David Truong was one of "our people in Washington." Krall testified that she observed a package being handed to Vietnamese government officials, and identified the package as the bookbag that contained copies of cables. Reports of Krall's CIA officer, first produced to the defense on remand, sharply contradicted both assertions. The CIA officer recounted Krall's contemporaneous account of her conversation with the head of the PRG mission in Paris "verbatim"; with no reference to David Truong. The CIA officer's recounting of the "package transfer" emphasized that what had been transferred was a package unopened by the FBI, i.e., not the bookbag containing the cables. Numerous other documents detailing government payments and services to Krall were not produced at trial. The trial court found any error in

the nonproduction of these documents to be "harmless" and the Fourth Circuit affirmed.

The defense had concededly met its burden under *Agurs v. United States*, 427 U.S. 97 (1976), and the Jencks Act, to make explicit and specific request for the documents in question. Over and over again, petitioner's trial counsel demanded production of prior statements and of impeachment material. With equal frequency, the prosecutors denied that any such material existed, only to partially and belatedly concede that they had erred. Repeated requests were made for the accounts Krall had previously given of the events in Paris to which she testified; none were produced to the defense at trial.

The testimony implicating David Truong omitted from Krall's contemporary account of her conversation in Paris was highly damaging to the petitioner. The omission represented invaluable impeachment material.[24] *See United States v. Beasley*, 576 F.2d 626 (5th Cir. 1978), *cert. denied*, 440 U.S. 947 (1979). The finding of "harmless error" runs wholly counter to the Court's

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[24]The rationale of the trial court was that any error was harmless because a subsequent statement of Krall's, made after she returned to the United States, contained the reference to David Truong. Therefore, reasoned the trial court, if Krall were impeached with the contemporarneous statement she could be rehabilitated with a "prior consistent statement." This subsequent statement had also not been provided to the defense at trial, in violation of the Jencks Act. While the Court has found harmless a Jencks Act violation where the defense already possessed the information in the withheld document, *Rosenberg v. United States*, 360 U.S. 367 (1959), here it is contended that the failure to produce a prior statement of the crucial witness omitting the most damaging part of her testimony is "harmless error" because the same information is *not* contained in a second statement also erroneously *not* disclosed to defense counsel.

caution: "Since courts cannot 'speculate whether [Jencks material] could have been used effectively at trial', *Clancy v. United States*, 365 U.S. 312, 316 (1961), the harmless error doctrine must be strictly applied in Jencks Act cases." *Goldberg v. United States, supra*, 425 U.S. at 111, n.21.

David Truong has from the time of his arrest insisted that he is innocent. The witness whose prior inconsistent statements were withheld provided the sole testimonial link between Truong and any Vietnamese government official. No error that precluded the full and fair exposition of that fundamental conflict in the evidence could conceivably be termed harmless. The trial court and the court of appeals opinions on this issue are classic instances of judges arrogating to themselves determinations that only advocates are qualified to make. *Dennis v. United States, supra*, 384 U.S. at 873-75. *See also Davis v. Alaska*, 415 U.S. 308 (1974) (importance of cross-examination).

This record presents, in short, a fundamental issue of trial fairness in a context of conceded governmental failure to produce relevant impeachment material.

CONCLUSION

For all of the above reasons, it is respectfully prayed that the writ for certiorari be granted.

Respectfully submitted,

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Dated: September 29, 1981

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
E. D. VIRGINIA
Alexandria Division

Crim. No. 78-25-A

March 30, 1978

UNITED STATES OF AMERICA

v.

RONALD LOUIS HUMPHREY
AND
TRUONG DINH HUNG,
Defendants

Proceeding was instituted on motion of defendants to suppress electronic surveillance and motion of one defendant to suppress physical seizures. The District Court, Albert V. Bryan, Jr., J., held that: (1) the United States is not required to apply for a warrant whenever the President, or the Attorney General acting at the President's designation, feels it necessary to electronically eavesdrop in his conduct of foreign affairs; (2) narrow foreign intelligence gathering exception to warrant clause was present in case; (3) warrantless telephone and microphone surveillance of apartment and warrantless video tape surveillance of public office were reasonable when conducted at a time when primary purpose of investigation undertaken by Attorney General at direction of President was foreign intelligence gathering, but were

unreasonable when conducted at a time when investigation had shifted from foreign intelligence gathering, and (4) physical seizures of various materials, including sealed envelopes, were either reasonable or unreasonable depending upon whether there was a reasonable expectation of privacy in such materials.

Motions granted in part and denied in part.

William B. Cummings, U.S. Atty., Alexandria, Va., David R. Homer, Washington, D.C., James R. Hubbard, Alexandria, Va., for the United States.

Marvin D. Miller, Alexandria, Va., Michael E. Tigar, Washington, D.C., for defendant Hung.

Warren L. Miller, Mark W. Foster, Moore & Foster, Roger E. Zuckerman, Zuckerman & Spaeder, Washington, D.C., for defendant Humphrey.

MEMORANDUM OPINION

BRYAN, District Judge.

The Court, on March 21, 1978, took under advisement both defendants' Motion to Suppress Electronic Surveillance and Motion to Suppress No. 3 (Physical Seizures).

Motion to Suppress Electronic Surveillance

These motions grew out of government monitoring of defendant Hung's telephone on a 24-hour basis, the installation of a microphone in Hung's apartment (2000 F Street, Apt. 201), and the installation of a television camera in defendant Humphrey's office in the United States Information Agency (USIA).

Certain details of the surveillance are not in dispute. Neither side contends that judicial approval was ever

sought in connection with the three kinds of surveillance undertaken. The defendants do not dispute that the surveillance was ordered either by the President of the United States, or the Attorney General acting pursuant to a Presidential delegation.

After two days of testimony the Motion to Suppress Electronic Surveillance was argued to the Court March 21, 1978. Counsel for defendant Humphrey suggested a three-pronged analysis at the beginning of his argument, which the Court adopts:

I. Is a warrant required whenever the President, or the Attorney General acting pursuant to Presidential delegation, desires to electronically eavesdrop in cases involving foreign affairs or foreign threats to the national security?[1]

II. If the answer to the first question is "no," was the narrow foreign intelligence gathering exception to the warrant clause recognized in *United States v. Butenko*, 494 F.2d 593 (3rd Cir. 1974), and *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973), present in the instant case?

III. Regardless of the answers to I and II, were the reasonableness requirements of the Fourth Amendment (independent of the warrant requirement and Title III of the Omnibus Crime Control Act of 1968, 18 U.S.C. § 2511(3) (hereinafter Title III) met?

The discussion will first address the standard of review utilized and then follow the order of the questions posed above.

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[1]The government does not contend that the Fourth Amendment is inapplicable to the circumstances of this case.

The government argues that the Court should adopt the clearly erroneous standard of review contained in the proposed Foreign Intelligence Surveillance Act. Whatever standard of review is adopted, the Court finds that the initial determination of the Attorney General that this investigation was a foreign intelligence investigation is supported by, at least, substantial evidence in the record. Moreover, even considered on a *de novo* basis, the Court makes the same factual determination.

The government further argues that the Court should defer to the Attorney General's expertise in his judgment that the investigation continued to be primarily a foreign intelligence investigation until January of 1978, when the decision to indict was made, and that this judgment should be upheld unless clearly erroneous. No support save the proposed Foreign Intelligence Surveillance Act is cited for this proposition. The Court feels that whether the focus of an investigation utilizing surveillance undertaken without a judicial warrant has shifted from primarily foreign intelligence gathering is a *de novo* determination to be based, as here, on evidence adduced at the hearing. The Court treats the question as a fact to be determined just as any other fact.

I.

The question of the applicability of the Fourth Amendment's warrant clause to electronic surveillance conducted under the Presidential powers in the area of foreign affairs, and more specifically foreign intelligence gathering, has not been decided by the Supreme Court. In *United States v. United States District Court (Keith)*, 407 U.S. 297, 92 S. Ct. 2125, 32 L.Ed.2d 752 (1972), the Supreme Court held that an executive electronic surveillance, though justified as necessary to protect

the nation from threats to domestic security, was not an exception to the Fourth Amendment warrant requirement. *Id.* at 323-24, 92 S. Ct. 2125. The Court expressed no opinion on whether identical considerations would compel a warrant for surveillance aimed at obtaining information relating to the foreign aspects of the national security.[2]

The Court concludes that, under traditional Fourth Amendment analysis, the United States is not required to apply for a warrant whenever the President, or the Attorney General acting at the President's designation, feels it necessary to electronically eavesdrop in his conduct of foreign affairs.[3] The Supreme Court in *Keith* inquired whether a warrant would better protect privacy and free expression, and second, whether imposing the warrant requirement would unduly frustrate the government's efforts to protect its security. This Court, as did the Court in *Keith*, answers the first *Keith* inquiry,

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[2]The Court adopts in this discussion the distinction between domestic and foreign threats to national security drawn by the plurality in *Zweibon v. Mitchell*, 170 U.S. App. D.C. 1, 516 F.2d 594 (1975) (en banc), *cert. denied* 425 U.S. 944, 96 S. Ct. 1684, 48 L.Ed.2d 187 (1976): domestic security surveillance is that undertaken in response to threats to the structure or existence of the government which originate directly from domestic organizations which are neither agents of nor acting in collaboration with foreign powers, while foreign security surveillance is a response to threats to the structure or existence of the government which emanate directly or indirectly from a foreign power. 170 U.S. App. D.C., n.42 at 20, 516 F.2d, n.42 at 613.

[3]Defendants have asserted that the government did not follow its own regulations governing the procedures under which this surveillance took place. The Court has examined the documents in Appendix B to the government's Opposition to the Motion to Suppress and concludes that the government did follow the pertinent regulations and procedures.

whether a warrant would better protect privacy and free expression, in the affirmative. It is the second prong of the *Keith* inquiry, the frustration inquiry, that gives this Court pause. While it may not always, or often, be the case that compliance with the warrant requirement would impose a burden on the government, the facts of this case support the government's contention that no existing warrant procedure can be reconciled with the government's need to protect its security and existence. While counsel for the defendant suggested in oral argument that a warrant procedure that does not follow the dictates of Rule 41, Fed. R. Crim. P., or Title III can be used, the Court rejects this. Title III, by its terms, governs the interception of conversations by means of microphones and wiretaps. The Act contains disclosure provisions, *see* 18 U.S.C. § 2518(8)(d). While it is true that the disclosure can, for good cause, be postponed, *id.*, it is hard to conceive of any Court that would be willing to allow the government to eavesdrop for more than a short period of time without requiring the government to proceed with criminal charges or to discontinue the surveillance. In either event the government ultimately would be forced to disclose the surveillance.

The tendency to force the government to elect prosecution or discontinuance of the surveillance and, in either event, to disclose the surveillance, is not the only factor that leads this Court to hold that a warrant is not *always* required in cases involving the foreign security aspects of foreign affairs. The Court accepts as valid the government's contention that the very nature of foreign intelligence gathering does not lend itself to the present warrant requirements. Often surveillance is undertaken with no probable cause; often surveillance is undertaken with no intention of prosecuting even if strong evidence

of criminal conduct is discovered. Foreign intelligence surveillance may of necessity be of considerable duration, *see* the related figures in *Keith*, note 3, 407 U.S. at 325-326 & n.2 at 334, 92 S. Ct. 2125 (appendix to opinion of Douglas, J., concurring). The length of the surveillance, if one accepts the proposition that it may be necessary, is a circumstance which, because of the notice requirements of Rule 41 and Title III, frustrates the government's ability to obtain this information. The Court recognizes that the conduct of foreign affairs is peculiarly the province of the President, and that whoever occupies that office must have the information necessary to enable him to make decisions that vitally affect the continued security of the government. The Court also recognizes that the conduct of a foreign state can pose a threat to the government different in scope and kind from that posed by an individual or a domestic organization; also, nations have financial and technological means available to them that individuals or domestic organizations do not. It is not at all certain that a judicial officer, even an extremely well-informed one, would be in a position to evaluate the threat posed by certain actions undertaken on behalf of or in collaboration with a foreign state. The Court perceives an entirely different purpose in surveillance designed to gather foreign intelligence information from domestic surveillance. It would seem rare that the government would engage in domestic electronic surveillance without some plans to prosecute *at some time.* If the representations made during oral argument of this motion can be credited, it is rare that foreign intelligence surveillance is undertaken with plans to prosecute. Certainly here no such plans were present at the outset of the undertaking. Whether the intelligence loses its usefulness with the disclosure of its being

obtained, or because of the traditional reluctance to reveal the extent to which security has been compromised, or whether it is for some other good reason, is not controlling. The Court is persuaded that an initial warrant requirement, at least in the circumstances of this case, would frustrate the President's ability to conduct foreign affairs in a manner that best protects the security of our government.

It is important to distinguish the frustration argument, which the Court finds persuasive, from the "necessity" argument presented during the taking of oral testimony.[4] The Court does not doubt that there are occasions when the President finds it necessary to conduct surveillance as part of his foreign affairs duties. To say, however, that because it is necessary a warrant is not required is to beg the question. Assuming, as the Court does, that it is necessary, the inquiry then shifts to the *Keith* analysis of whether a warrant would better protect privacy and free expression and whether imposing the warrant requirement would unduly frustrate the government's efforts to protect its security and existence.

II.

This does not mean that the judiciary should abdicate its role as soon as the flag of foreign intelligence is raised. As noted above, the government often undertakes surveillance with no intention of prosecution; once prosecution is actively considered, however, the Court must become involved in order to determine whether the

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[4]The Attorney General testified that the reason for not getting a warrant was not the notice provision of Title III, but because in his view one was not necessary in a foreign intelligence gathering operation.

primary focus has shifted away from foreign intelligence gathering.

It is conceded that the government never obtained, nor sought to obtain, a judicial warrant for the surveillance undertaken in this case. The government urges on the Court the foreign intelligence gathering exception recognized in *United States v. Butenko, supra,* and *United States v. Brown, supra.*[5]

In *Butenko,* a case that also involved an American citizen alleged to be acting in concert with a foreign national to violate portions of the Espionage Act, the Third Circuit Court of Appeals held that, while the Fourth Amendment did apply to surveillances conducted and maintained solely for the purpose of gathering foreign intelligence information, the warrant requirement did not. 494 F.2d 605. In *Brown,* the Fifth Circuit, relying on its earlier decision in *United States v. Clay,* held that the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence. 484 F.2d at 426. The issue before the Court in *Brown* was not whether the conversations overheard through the exercise of this power could be admitted into evidence but whether the interception was illegal, thus necessitating their disclosure under the rule

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[5]The Court is cognizant of the cases of *United States v. Smith,* 321 F. Supp. 424 (C.D. Cal. 1971), and *United States v. Clay,* 430 F.2d 165 (5th Cir. 1970), *rev'd on other grounds* 403 U.S. 698, 91 S. Ct. 2068, 29 L.Ed.2d 810 (1971), and their citation by the *Keith* Court, 407 U.S. at 322 n.20, 92 S. Ct. 2125. The discussion in *Smith* was *dicta* while the *Clay* Court had found the conversations overheard not germane to the prosecution at issue. This is clearly not the situation in the instant case. The Court also notes that *Brown* is a later decision by the same Circuit Court that decided *Clay.*

of *Alderman v. United States*, 394 U.S. 165, 89 S. Ct. 961, 22 L.Ed.2d 176 (1969).[6]

The Court accepts the reasoning of *Butenko* and *Brown* and their holdings that an exception to the warrant clause is present when electronic surveillance is undertaken for the purpose of gathering foreign intelligence by the President of the United States or the Attorney General acting at the direction of the President. The Court also adopts in support of its holding the reasoning contained in the discussion of I, *supra*.[7]

This, of course, does not end the inquiry. Given that an exception for foreign intelligence gathering exists, was that exception present under the facts of this case?

Butenko adds the qualification "*solely*" for the purpose of gathering foreign intelligence, 494 F.2d at 605. While courts must always be on guard against government efforts to circumvent the Fourth Amendment by the use of inapplicable exceptions, it is difficult to see how a test could be formulated if the standard were that of "solely" for foreign intelligence gathering purposes. Would this require the government to be completely barred from prosecution when a genuine foreign intelligence gathering surveillance disclosed evidence of criminal activity? It seems to the Court, and there was

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[6]Since full disclosure has been made here, this aspect of *Alderman* need not be considered. A hearing on the legality of the surveillance has been held.

[7]The case of *Zweibon v. Mitchell, supra*, was cited to the Court as condemning the foreign intelligence exception. While it is possible to read the opinion that way, the plurality limited its holding to surveillance in which the subjects are neither agents nor collaborators of a foreign power. *Id.* at 651. The indictment in this case charges that the defendants are both.

credible evidence adduced during the hearing that would support this, that such surveillance will often turn up evidence of criminal activity. While this Court is loathe to give the government in effect a free ride by allowing all evidence of criminal activity to be admitted once persuaded that such evidence had been obtained from a genuine foreign intelligence surveillance, it does not follow that the rejection of the "solely" test would do so. The "primary purpose" test, which in all likelihood would be applied even if nominally the test were "solely," appears to balance the interests of the government in the conduct of foreign affairs and the potential defendant. It asks "was the primary purpose of this surveillance on this day to gather foreign intelligence information?" It is with this inquiry that the Court turns to the facts of this case.

The Court has, as indicated, concluded that, at the time of its initiation, the surveillance in this case was undertaken for the primary, or even sole, purpose of foreign intelligence gathering. Deputy Secretary of State Christopher's letter to Attorney General Bell speaks of a serious compromise of the State Department's classified information. In addition, the Attorney General's testimony that he viewed his mission as the identification and prevention of the source(s) of such compromise, was convincing.

Defendants argue that the primary focus of the surveillance ceased to be the gathering of foreign intelligence early on. They point to the early involvement of Criminal Division attorneys, particularly a May 26, 1977 Memorandum from Clarence Kelly, FBI Director, to Attorney General Bell, requesting authorization for installation of a microphone at the residence of de-

fendant Hung. Defendant's Ex. 1. On page 2 of that memorandum is the following paragraph:

> On May 25, 1977, John L. Martin, Deputy Chief, Internal Security Section, Criminal Division, U.S. Department of Justice, advised that, if prosecution is undertaken against Hung, Humphrey or others for violating the Espionage Act and related statutes, he would recommend that action described above taken by the Attorney General be defended in court using the same legal justification currently used in national security and electronic surveillance motions.

The Court is not persuaded that this paragraph establishes the shift in primary focus away from foreign intelligence gathering. The paragraph immediately preceding the quoted one states, in part, that ". . . this [microphone] coverage could afford the possibility of ascertaining the identities of other individuals who may be furnishing sensitive U.S. Government information to Hung." The Court also notes that the Memorandum is tentative in tone; the reference therein to prosecution is conjectural, offering a justification *if* prosecution is undertaken. The Court cannot say that this indicates a shift in primary focus away from foreign intelligence gathering. In order to do so it would require a holding that whenever any evidence is adduced indicating that the government ever *considered* prosecution, the primary focus, by definition, had shifted away from foreign intelligence gathering. It is unrealistic to expect, in a case like this one, that the option of prosecution is never considered. The relevant inquiry remains however: when, if at all, did the primary focus of the surveillance shift away from foreign intelligence gathering?

The Court reaches the same conclusions about the setting up of a criminal file during this same period of

time. No one disputes that the electronic surveillance uncovered evidence of criminal activity almost immediately; it is logical that whatever file was opened in the Department of Justice would have a criminal number. That such a file was opened, and that it bore the designation SRV/Esp (Socialist Republic of Vietnam/Espionage) and SRV-RA (Socialist Republic of Vietnam—Registration Act), is a factor to be considered, but it is not dispositive. The Court has considered these facts but it is not persuaded that the focus had shifted by late May.

The Court, however, is not convinced that the primary purpose of the surveillance remained foreign intelligence gathering throughout the life of the surveillance. While no one event, act, or conversation in itself pinpoints an exact date, the following chronology of events shows not just an increasing awareness of criminal prosecution but an approach to a commitment to prosecution. Attorney General Bell's affidavit shows that little, if anything, in the way of new foreign intelligence came to light after June. Evidence adduced at the hearing indicated a growing involvement of the Criminal Division of the Justice Department, beyond the opening of a criminal file and the initial prosecutive evaluation referred to above. The testimony of John Martin, Deputy Chief, Internal Security Section, Criminal Division, indicated that in June the discussion of possible prosecution inside the Justice Department was coincidental to the foreign intelligence investigation. The impression created of the early meetings was that Martin was simply being briefed by the FBI on the status of one foreign intelligence investigation. The Court also notes that during his early involvement in the case Martin offered no advice as to how the tap should be conducted or as to the focus of the investigation. Tr. 24-25. The documents submitted

to the Court *in camera* (March 20, 1978 submission) support this testimony. Those same documents, however, also support the conclusion that by midsummer the primary focus of the investigation had shifted away from foreign intelligence gathering. A July 19 Status Memorandum, Exhibit D *in camera*, states for the first time that probable cause existed to charge both defendants. That Memorandum is clearly a prosecution-oriented document, focusing on the availability of witnesses and documents. A July 20 letter from the Attorney General to the Director of Central Intelligence, Exhibit E *in camera*, encloses a copy of the July 19 Memorandum and a fair characterization of the cover letter would be that it shows the Justice Department trying to put together a criminal case. A similar letter to Zbigniew Brzezinski, Assistant to the President for National Security Affairs, Exhibit G *in camera*, contains this sentence: "The State Department and the CIA have been requested to make the necessary documents and witnesses available for use at trial." The Court cannot conclude that at that point the primary focus of the investigation remained foreign intelligence gathering; on the contrary, the documents indicate that the primary focus had shifted away from such gathering. While it is true that the testimony and exhibits (including those submitted *in camera*) show that the Justice Department may not have had a "winnable" case until much later, this is not the test. The test is: what is the primary focus of the investigation? The Court concludes that by July 20, 1977, the primary focus of the investigation was no longer foreign intelligence gathering, and therefore all evidence obtained from the telephone and microphone surveillance after July 20, 1977, as well as the fruits thereof, must be suppressed.

III.

The final question to be addressed is, regardless of whether the surveillance can be justified, was it reasonable? Two issues are raised: the duration of the surveillance and the minimization of the intrusion.

The intrusion in this case was massive. The interception on Hung's apartment began on May 11, 1977, and ran continuously for two hundred and sixty-eight (268) days. There is a representation in Humphrey's Motion to Suppress at p. 6, that the government estimates the number of calls involving Humphrey intercepted as approximately twenty (20) and the total number of calls intercepted as in excess of 500. The microphone in Hung's apartment was installed May 27, 1977; it too ran continuously and for a period of two hundred and fifty-five (255) days. It is uncertain how many conversations of defendant Humphrey were monitored. Finally on or about June 20, 1977, pursuant to an authorization of the President of the United States, a videotape camera was installed in defendant Humphrey's office in the United States Information Agency (USIA). That surveillance ran for eighty-five (85) days, terminating on September 15, 1977.

In view of the previous holding, based upon a shift in the primary focus of the investigation away from foreign intelligence gathering, that all such evidence obtained after July 20, 1977, should be suppressed, the Court need only consider whether the surveillance was reasonable up to that date. The Court concludes that it was reasonable. An investigation such as this one may take a considerable amount of time. Code names may be utilized, and apparently innocuous conversations may, upon expert examination, reveal a more sinister context.

It is difficult to see how, absent a blanket interception for a reasonable period of time, the government could assure itself that all the actors in an espionage ring had been identified.

Were the Court to consider whether beyond July 20, 1977, the interception continued to be reasonable, a separate treatment of the videotape interception would be necessary. *See* the discussion *infra*. Regarding the telephone and microphone surveillance, there was no evidence proffered by the government (on whom the burden rested) as to what period of time would be reasonable. However, it is hard for the Court to conceive that by July 20, 1977, after a blanket interception of over eighty days, the participants could not have been identified, and at least some greater selectivity exercised, even if necessity for the surveillance continued.[8] Therefore, the Court finds that the warrantless tap and bug became unreasonable after July 20, 1977.

A separate discussion of the videotape intrusion is required. Humphrey has standing to object to that intrusion. *Mancusi v. DeForte*, 392 U.S. 364, 88 S. Ct. 2120, 20 L.Ed.2d 1154 (1968). While the defendant does not discuss this intrusion at great length, and while the government, asserting that the tapes are illegible and will not be used in its case, does not discuss the issue at all in its brief, certain observations are relevant in the event that the progress of the case causes a change in the government's position.

First, while the Court assumes that there exists some expectation of privacy in an office, that expectation is a lesser one than that of a home. One assumes that in

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[8]Social contacts were eliminated from microphone surveillance as was one attorney-client telephone conversation.

an office conversations may be overheard and actions observed. At the minimum it would appear that one's employer would have a right to see that the employee was performing as expected.

Second, the Court notes that the videotape intrusion, unlike the telephone and microphone intrusion, was minimized in the material acquired. There was no voice interception, only Humphrey's physical movements around the office were monitored. Even more important is the fact that the intrusion was expressly designed to observe the conduct most relevant to the government investigation: was Humphrey copying or stealing classified government documents from his employer?

Thus, while the Court finds the Fourth Amendment applicable to this surveillance, it also finds it justified by the same rationale as the telephone and microphone surveillance, and it finds the intrusion reasonable, at least until July 20, when as found above, the primary focus of the investigation shifted away from foreign intelligence gathering. Continued video surveillance after that date, however, was reasonable because of the office setting and the limited scope of the intrusion. Nevertheless, for the other reasons previously set forth, the warrantless surveillance on and after July 20 is improper. Defendant's Motion to Suppress the Video Surveillance prior to July 20, 1977, is accordingly denied.

Defendant Hung's Motion to Suppress No. 3
(Physical Seizures)

On April 22, 1977, FBI Special Agent William Fleshman, Jr., received a flight bag from Ms. Hung Krall ("the Asset"). The Asset testified that she had received the assorted contents of the bag from defendant Hung

on April 19 and 21 with instructions to handcarry them to designated individuals in Paris, France. The flight bag, which belonged to the Asset and into which she had placed the items, contained a number of books, some sealed envelopes and a large unsealed manila envelope. Inside that unsealed envelope was a George Washington University bookstore bag approximately 8½" x 11" tied with twine. The bookstore bag[9] was made of a thin plastic and was doubled over at the top. The plastic was sufficiently thin that, through it, lettering could be read on the top sheet of the bundle of papers that was contained within. The documents were further secured inside the bookbag by strips of heavy opaque paper which covered approximately 75% of the surface of the papers. This bundle is the basis of defendant's first Motion to Suppress No. 3 (Physical Evidence).

On April 22, 1977, a representative of the FBI Office of Legal Counsel met with Acting Assistant Attorney General John M. Harmon, head of the Office of Legal Counsel, Department of Justice. At this meeting, Harmon was informed that the FBI had intercepted a package and wished to open it to inspect its contents. The package was not presented to Harmon at this meeting, nor was any photograph or facsimile. The FBI official described the seized package and the facts

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[9]The Court has not inspected the original package, and presumably it is no longer available. The FBI opened the package, photographed its contents and repackaged it before returning it to the Asset for its eventual delivery to the Paris recipients. The Court bases its description of the package on the testimony adduced at suppression hearings on March 17 and 20, 1978, a facsimile introduced by the government (without objection from the defendant as to the accuracy of reproduction) and a photograph taken prior to the April, 1977, opening submitted by the United States at the request of the Court while these motions were under advisement.

surrounding the seizure. Based upon those representations, Harmon concluded that since it was "unsealed" there was no reasonable expectation of privacy in that package and that no warrant or authorization from the President was necessary to legally open the package.

Defendant attacks the warrantless opening of this package and urges that its contents as well as the fruits thereof be suppressed. The government first contends that the evidence is not suppressible based on a theory of consent. Second, the government argues that Hung had no reasonable expectation of privacy in that package and thus Fourth Amendment protections do not attach. The Court agrees with this second argument and turns to it first.[10]

The government contends that the flimsy nature of the wrapping and the fact that the package was given over to another person (albeit a government agent, *see, infra*) for delivery across international borders vitiated the reasonable expectation of privacy that traditionally attaches to wrapped packages. The government further points out that Hung never gave his courier specific instructions concerning the jumble of materials turned over and that if all went as Hung planned he was never again going to see or possess that package.

The appropriate standard of review for the Court is whether the expectation of privacy is reasonable given the totality of the circumstances. *United States v. Rabinowitz*, 339 U.S. 56, 66, 70 S. Ct. 430, 94 L. Ed. 653 (1950). The facts of this case indicate that such an

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[10]The government concedes that the foreign intelligence gathering exception discussed earlier in this opinion does not cover the April seizure because no Presidential authority was sought or obtained prior to opening this package.

expectation of privacy was unreasonable as to the April 22 package. Various factors enter into this consideration.

Defendant Hung's expectation of privacy was to some extent undercut by the fact that these materials were being sent across international borders. Defendant is presumed to know of the risk of inspection by government officials when ingress or egress from our borders is involved. *United States v. Ramsey*, 431 U.S. 606, 97 S. Ct. 1972, 52 L.Ed.2d 617 (1977); *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S. Ct. 2535, 37 L.Ed.2d 596 (1973). However, this consideration of itself does not eliminate a reasonable expectation of privacy. In the Court's view the pivotal factor in the analysis of this seizure is the wrapping of the package itself.

In order for an individual to have a reasonable expectation of privacy, common sense demands that certain steps be taken in certain circumstances. For example, papers left on one's desk in one's home may be assumed to be immune from the suspicious gaze of government agents acting without a warrant. On the other hand, if those same papers are left on a table at a public library some additional affirmative action may be required on the part of the owner to make his expectation of privacy reasonable. In short, it is fair to expect greater efforts to insure privacy as the degree of "publicness" surrounding the papers increases. Although no one hard and fast rule could possibly cover all situations, the Court views steps such as covering the papers with a binder or more likely, sealing or affixing a seal as the sort of behavior consistent with a concern for the privacy of the papers contained within.

In the case at bar, the Court notes that, although tied with twine and covered with a flimsy bookbag, the

contents were neither totally hidden from view nor inaccessible by virtue of the gum seal of an envelope or some more elaborate wax seal. The Court finds that this apparent lack of concern for the secrecy of the contents of the package fatally undercuts defendants's expectation of privacy, such that the protections of the Fourth Amendment do not attach. Defendant's Motion to Suppress the contents of the April 22 search is therefore denied.

On May 12, 1977, the Attorney General sought and received from the President authorization for physical searches of sealed packages and envelopes delivered to the FBI by the Asset, where such packages or envelopes were sent from or to be delivered to identified intelligence personnel of a foreign country.[11] That same day the Asset delivered to Special Agent Fleshman a letter to defendant Hung from Phan Thanh Nam, an SRV official in Paris. The letter was sealed in an envelope.[12] The May 12 delivery is thus distinguishable from the events of April 22 for that critical reason. By the simple act of sealing an envelope the owner is in effect saying to the

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[11](Documents 78-25-10 and 78-25-11). Authorization for seizures under similar conditions was sought and obtained on September 8, 1977 (Documents 78-25-23 and 78-25-24) and on September 21, 1977 (Documents 78-25-25 and 78-25-26).

[12]As was the case with the April 22 package, the Court has not inspected the May 12 original; it was delivered to Hung after opening, photographing and repackaging by the FBI. The same is true of the various packages and envelopes that are the focus of the remainder of Motion to Suppress No. 3 (Physical Seizures). The Court's descriptions of these materials are once again based upon testimony at the suppression hearings and photographs supplied by the FBI at the Court's request. No facsimiles were submitted. Defendant has not objected to the government's descriptions of the seized packages and envelopes.

world "the contents of this envelope are not intended for your eyes." Hence, the Fourth Amendment attaches because the defendant Hung had a reasonable expectation of the privacy of that communication and the government's warrantless search must be justified by reliance on one of the "jealously and carefully drawn" exceptions to the warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443, 454, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

Prior to this search the FBI obtained authorization from the President to open the envelope without a warrant. This brings into play the foreign intelligence gathering exception to the warrant requirement discussed earlier in this Opinion. Since this search occurred prior to July 20 (the point at which the Court has found that the focus of the investigation shifted away from intelligence gathering) the warrant exception applies, and the evidence will not be suppressed unless the government's behavior was unreasonable.[13] The Court finds that the FBI's opening, photographing and repackaging was reasonable, and the defendant's Motion to Suppress No. 3 as to the May 12 search must be denied.

On June 23, 1977, the Asset again met with defendant Hung and this time the defendant furnished the Asset with a large grocery bag. Inside this bag was a large manila envelope which contained assorted materials, including one sealed envelope, one envelope secured by a metal clasp and one unsealed envelope. Following the

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[13]The Court is unpersuaded that there is any constitutional significance to the fact that this was a physical seizure and search and not an electronic seizure. It would be incongruous indeed were a court to find the opening of an envelope more intrusive than a wiretap or bug that runs for weeks at a time.

analysis applied to the earlier deliveries, a reasonable expectation of privacy attached to the sealed and to the clasped envelope. Once again, however, the search occurred pursuant to the President's foreign intelligence gathering power and prior to the July 20 shift of focus. Therefore, the Motion to Suppress No. 3 as to the June 23 package is denied. The same result applies to what appears to be another sealed envelope given to the Asset for delivery from Hung to SRV intelligence personnel in Paris that same day.

On September 13, 1977, the Asset delivered to Special Agent Fleshman a letter for Hung from Phan Thanh Nam in Paris. This was once again a sealed envelope, so that Fourth Amendment protections attach. This search occurred two months after the date the Court has found that the investigation altered its focus, and hence, the evidence is not admissible in the government's case on the basis of the foreign intelligence gathering exception.

The government offers as an alternative a theory of consent that would, if accepted by the Court, bring in evidence that was the result of searches that occurred after the shift of focus. Briefly summarized, the government's argument goes as follows: Hung gave his implied consent to the Asset to open the package by virtue of his instructions to deliver the packages over international boundaries and the fact that the Asset had what the government terms "undisputed authority and control over the packages." In other words, the government argues that Hung assumed the risk that the courier would not be trustworthy and must suffer the consequences.

The government's theory fails for several reasons. First, the contention that the Asset was given "undisputed control" over the contents of the packages and sealed envelopes is essentially unsupported in the record

and is undercut by the very sealing of the envelopes. The status of "bailee" (*see* Government's Opposition, p. 63) does not carry with it the implication that the tender is without limitation. The record is barren of any indication that the Asset shared with Hung any "joint" possession or other relationship with the documents whatsoever. She was, as far as Hung was concerned, the personal equivalent of United Parcel Service; that is, a non-government courier.

By the same token, whatever "consent" was given here was clearly violated by the scope of the intrusion, certainly as to those seizures which occurred after the April seizure. The case of *United States v. Glassel*, 488 F.2d 143 (9th Cir. 1973), is instructive here. In that case an informant and a police officer (misrepresenting his identity) obtained an invitation into defendant's house. The court there ruled that the two could properly gain the consent to enter by false pretenses, but that once inside, their search had to be limited to the scope of the consent; hence, seizures of contraband in plain view were admissible but evidence gained from a full-scale search was not. *Id.* at 145.

In the case at bar, the Asset gained the "consent" to deliver the materials and perhaps the right to inspect what was in plain view (i.e., not in a sealed or otherwise secured status), but cannot fairly be said to have been given consent to take that key extra step the opening of a sealed communication. As in *Glassel, supra*, that extra step—was beyond the scope of the consent that was given or that can fairly be implied from all the circumstances.

The government's position is additionally troubling to the extent that it assumes that the Asset can give the broad-gauged consent asserted herein. The government

cites cases involving landlords giving consent for tenants, one roommate for another, a messenger for his employer. Perhaps the heaviest reliance is placed on the recent Fourth Circuit decision in *United States v. Carter*, 569 F.2d 801 (1977). In that case the owner of a truck allowed the FBI to search the truck regularly assigned to his employee Carter. The search led to a pistol. The Court of Appeals rejected the defendant's argument that the evidence should be suppressed because the gun was found wrapped inside a coat inside the truck. The consent was given broad construction because the consenting party had "dominion over the property." At 803.

What the government fails to point out in this case is that besides the fact that this consenting party (the Asset) had no colorable claim to the contents of sealed envelopes given her for transmission purposes, the broad scope of consent they urge here necessarily comes from the government *itself*. The Asset is clearly an "agent" of the government under the facts of this case. The testimony shows that she has been working closely with (first) the CIA and (later) the FBI for well over a year prior to the searches and seizures in question. She had been party to sensitive discussions both here and abroad with agents and officials of both agencies. Her cooperation was considered vital and was a topic of extensive discussions at the very highest levels of our government. Finally, *in camera* documents indicate that "remuneration" for her efforts involved promises of assistance quite different than those commonly given government informants. In short, she was clearly an operative of the government acting under their direction and control, far more important and deeply involved in this sensitive investigation than the garden-variety informant. To accept her consent as binding on the defendant and

to construe it broadly is paramount to allowing the government to itself consent to searches on behalf of a defendant, clearly an unacceptable result.

The government cites two cases for the proposition that it is irrelevant that the consent was given by an informant. Both of these cases, *United States v. Tussell*, 441 F.2d 1092 (M.D. Pa. 1977), and *United States v. Kurck*, 552 F.2d 1320 (8th Cir. 1977), are inapposite, as the informants there did not have the unique agency relationship with the United States that characterizes this case.[14] *Cf. Burdeau v. McDowell*, 256 U.S. 465, 41 S. Ct. 574, 65 L. Ed. 1048 (1921).

Therefore, the Court grants defendant's Motion to Suppress as to the September 13 letter.

On September 19, 1977 Hung furnished the Asset with several items to be delivered to SRV intelligence personnel in Paris. One of these items was a sealed manila envelope, and again the Asset gave the envelope to the FBI for opening. Consistent with the above analysis, there was a reasonable expectation of privacy in the sealed envelope; the search, occurring after the July 20 shift of focus, is not covered by the foreign intelligence gathering exception to the warrant requirement. Finally, the Court, for the same reasons, rejects the government's consent theory. The September 19 evidence must therefore be suppressed.

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[14]The agent/informant distinction was, in fact alluded to in one of the cases cited by the government. In *Tussell* the Court noted "There was no evidence that Mettrick was acting as an agent of, as opposed to an informer for, the Customs Service." 441 F. Supp. 1104, n.24.

On September 20, 1977, Hung gave the Asset a final letter for delivery to SRV officials in Paris. Applying the identical analysis, this evidence must be suppressed as well.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 78-5176, 78-5177

UNITED STATES OF AMERICA,
Appellee,

v.

TRUONG DINH HUNG,
Appellant.

UNITED STATES OF AMERICA,
Appellee,

v.

RONALD LOUIS HUMPHREY,
Appellant.

Argued Dec. 6, 1979 Decided July 17, 1980

Defendants were convicted in the United States District Court for the Eastern District of Virginia, Albert V. Bryan, Jr., J., of espionage, conspiracy to commit espionage and several espionage-related offenses for transmitting classified information to representatives of the Socialist Republic of Vietnam during the 1977 Paris negotiations between that country and the United States, and they appealed. The Court of Appeals, Winter,

Circuit Judge, held that: (1) evidence obtained pursuant to reasonable warrantless searches and surveillances of defendants prior to time that investigation became "primarily" criminal investigation was admissible against defendants; however, evidence obtained through warrantless surveillance subsequent to that time was properly excluded; (2) application of statute requiring agents of a foreign government to register did not violate Fifth Amendment; (3) appeals from espionage and espionage-related convictions would be remanded for further proceedings to determine whether documents produced by Government near end of trial contained Jencks Act material that should have been supplied to the defense; and (4) Jencks Act was not violated by destruction of confidential CIA informant's written reports to her superior for reason that the reports, which had been destroyed according to routine CIA procedures before any criminal prosecution was contemplated, were destroyed outside context of a criminal investigation.

Affirmed and remanded.

Donald Russell, Circuit Judge, filed separate opinion in which he concurred in part and dissented in part and in which K. K. Hall, Circuit Judge, joined.

Michael E. Tigar, Washington, D.C. (John Mage, John J. Privitera, Washington, D.C., Marvin D. Miller, Alexandria, Va., on brief), for appellant Truong Dinh Hung.

Mark Foster, Washington, D.C. (Moore & Foster, Roger E. Zuckerman, Zuckerman, Spaeder & Taylor, Warren L. Miller, Stein, Halpert & Miller, Washington, D.C., on brief), for appellant Ronald Louis Humphrey.

Jerome M. Feit, Dept. of Justice, Washington, D.C. (William G. Otis, Robert J. Erickson, Paul J. Brysh, Elliott Schulder, David R. Homer, Ann T. Wallace, Dept. of Justice, Washington, D.C., William B. Cummings, U.S. Atty., Justin Williams, Asst. U.S. Atty., Alexandria, Va., on brief), and Kenneth C. Bass, III, Reston, Va., for appellee.

Marshall Perlin, New York City, on brief, for amicus curiae National Alliance Against Racist and Political Repression.

Before WINTER, RUSSELL and HALL, Circuit Judges.

WINTER, Circuit Judge:

Truong Dinh Hung, more familiarly known as David Truong, and Ronald Humphrey were convicted of espionage, conspiracy to commit espionage and several espionage-related offenses for transmitting classified United States government information to representatives of the government of the Socialist Republic of Vietnam. In these appeals, they seek reversal of their convictions because of warrantless surveillance and searches, the alleged inapplicability of the espionage statutes and the theft-of-government-property statute to the facts of this case, several alleged Jencks Act violations, an alleged denial of compulsory process, and claimed error in a number of the district court's evidentiary rulings.

We hold that the warrantless searches and surveillance did not violate the Fourth Amendment, that the espionage statutes were properly and constitutionally applied to this case, that the defendants were not denied compulsory process, and that the district court did not err in any of its evidentiary rulings. Relying on the concurrent sentence doctrine, the majority holds that we should not rule on defendants' claim that the theft-of-

government-property statute does not apply to this case. However, for myself, I would conclude that the issue concerning the theft-of-government-property statute should be addressed and that the statute does not encompass the actions of the defendants. I would therefore reverse their convictions under that statute. We are unanimous, however, in remanding the case to the district court for further proceedings to determine whether documents produced by the government near the end of trial contain Jencks Act material that should have been supplied to the defense.

I.

David Truong, a Vietnamese citizen and son of a prominent Vietnamese political figure, came to the United States in 1965. At least since his arrival in the United States, Truong has pursued an active scholarly and political interest in Vietnam and the relationship between Vietnam and the United States. In 1976, Truong met Dung Krall, a Vietnamese-American, the wife of an American Naval Officer, who had extensive contacts among the Vietnamese community in Paris. Truong persuaded Krall to carry packages for him to Vietnamese in Paris. The recipients were representatives of the Socialist Republic of Vietnam at the time of the 1977 Paris negotiations between that country and the United States. The packages contained copies of diplomatic cables and other classified papers of the United States government dealing with Southeast Asia. Truong procured the copies from Ronald Humphrey, an employee of the United States Information Agency, who obtained the documents surreptitiously, copied them, removed their classification markings and furnished the copies to Truong. In a statement given after his arrest,

Humphrey said that his motive was to improve relations between the North Vietnamese government and the United States so that he could be reunited with a woman whom he loved who was a prisoner of the North Vietnamese government.

Unknown to Truong, Krall was a confidential informant employed by the CIA and the FBI. Krall kept these agencies fully informed of Truong's activities and presented the packages Truong had given her to the FBI for inspection, copying and approval before she carried the documents to Paris. The FBI permitted this operation to continue, while monitoring it closely, from approximately September, 1976, until January 31, 1978.

When the intelligence agencies first learned that Truong was transmitting classified documents to Paris, they were understandably extremely anxious to locate Truong's source for his data. Toward that end, the government conducted a massive surveillance of Truong. Truong's phone was tapped and his apartment was bugged from May, 1977 to January, 1978.[1] The telephone interception continued for 268 days and every conversation, with possibly one exception, was monitored and virtually all were taped. The eavesdropping device was operative for approximately 255 days and it ran continuously. No court authorization was ever sought or obtained for the installation and maintenance of the telephone tap or the bug. The government thus ascertained that Humphrey was providing Truong with the copies of secret documents. This leak of sensitive information of course ceased when Truong and Humphrey were arrested on January 31, 1978.

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[1] For eighty-five days, from June to September, 1977, the FBI also video-taped Humphrey's activities in his office at the United States Information Agency.

After a protracted trial, Truong and Humphrey were both convicted of espionage and conspiracy to commit espionage in violation of 18 U.S.C. §§ 371 and 794(a) and (c). They were also convicted of conspiracy to convert classified government documents exceeding $100 in value and conversion, in violation of 18 U.S.C. §§ 371 and 641; acting as agents of a foreign government without prior notification to the Secretary of State in violation of 18 U.S.C. §§ 951 and 2; delivery of material related to the national defense to unauthorized persons in violation of 18 U.S.C. §§ 793(e) and 2; and conspiracy to violate 50 U.S.C. § 783(b) and (c), which penalize government employees who transmit, and foreign agents who thereby receive, classified information.

II.

A. *Foreign Intelligence Exception to the Warrant Requirement*

The defendants raise a substantial challenge to their convictions by urging that the surveillance conducted by the FBI violated the Fourth Amendment and that all the evidence uncovered through that surveillance must consequently be suppressed. As has been stated, the government did not seek a warrant for the eavesdropping on Truong's phone conversations or the bugging of his apartment. Instead, it relied upon a "foreign intelligence" exception to the Fourth Amendment's warrant requirement. In the area of foreign intelligence, the government contends, the President may authorize surveillance without seeking a judicial warrant because of his constitutional prerogatives in the area of foreign affairs. On this basis, the FBI sought and received approval for the surveillance from the President's delegate,

the Attorney General. This approval alone, according to the government, is constitutionally sufficient to authorize foreign intelligence surveillance such as the surveillance of Truong.

The district court accepted the government's argument that there exists a foreign intelligence exception to the warrant requirement. The district court, however, also decided that the executive could proceed without a warrant only so long as the investigation was "primarily" a foreign intelligence investigation. The district court decided that the FBI investigation had become primarily a criminal investigation by July 20, 1977, and excluded all evidence secured through warrantless surveillance after that date. Conversely, all evidence secured before July 20 was not suppressed by the district court, because it determined that during that period the investigation primarily concerned foreign intelligence.

We agree with the district court that the Executive Branch need not always obtain a warrant for foreign intelligence surveillance. Although the Supreme Court has never decided the issue which is presented to us, it formulated the analytical approach which we employ here in an analogous case, *United States v. United States District Court (Keith)*, 407 U.S. 297, 92 S. Ct. 2125, 32 L.Ed.2d 752 (1972). In *Keith*, the executive had conducted warrantless domestic security surveillance. The Court posited two inquiries to guide the Fourth Amendment determination of whether a warrant is required:

> If the legitimate need of Government to safeguard domestic security requires the use of electronic surveillance, the question is whether the needs of citizens for privacy and free expression may not be better protected by requiring a warrant

> before such surveillance is undertaken. We must also ask whether a warrant would unduly frustrate the efforts of Government to protect itself from acts of subversion and overthrow directed against it.

407 U.S. at 315, 92 S. Ct. at 2135. Balancing individual privacy and government needs, the Supreme Court concluded that the executive must seek a warrant before it undertakes domestic security surveillance.

For several reasons, the needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would, following *Keith*, "unduly frustrate" the President in carrying out his foreign affairs responsibilities. First of all, attempts to counter foreign threats to the national security require the utmost stealth, speed, and secrecy. A warrant requirement would add a procedural hurdle that would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay executive response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operations.[2] *See Zweibon v. Mitchell*, 516

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[2]The practical difficulties of obtaining a warrant for foreign intelligence surveillance were particularly acute at the time this surveillance was conducted, because Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20, which specifies warrant procedures, contained no procedures tailored to foreign intelligence surveillance. In fact, in Title III Congress explicitly chose not to address the sort of surveillance involved in this case when it disclaimed any intent to "limit the constitutional power of the President to take such measures as he deems necessary . . . to protect national security information against foreign intelligence activities." 18 U.S.C. § 2511(3). That disclaimer was repealed by the Foreign Intelligence Surveillance Act of 1978, *see* note 4, *infra*, which established a mechanism to govern the issuance of warrants for foreign intelligence surveillance.

F.2d 594, 704 (D.C. Cir. 1975) (Wilkey, J., concurring and dissenting).

More importantly, the executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance. *See New York Times Co. v. United States*, 403 U.S. 713, 727-30, 91 S. Ct. 2140, 2148-2150, 29 L.Ed.2d 822 (1971) (Stewart, J., concurring); *United States v. Belmont*, 301 U.S. 324, 330, 57 S.Ct. 758, 760, 81 L. Ed. 1134 (1937). The executive branch, containing the State Department, the intelligence agencies, and the military, is constantly aware of the nation's security needs and the magnitude of external threats posed by a panoply of foreign nations and organizations. On the other hand, while the courts possess expertise in making the probable cause determination involved in surveillance of suspected criminals, the courts are unschooled in diplomacy and military affairs, a mastery of which would be essential to passing upon an executive branch request that a foreign intelligence wiretap be authorized. Few, if any, district courts would be truly competent to judge the importance of particular information to the security of the United States or the "probable cause" to demonstrate that the government in fact needs to recover that information from one particular source.[3]

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[3] *See* note 4, *infra*, for a discussion of the Foreign Intelligence Surveillance Act of 1978, which authorizes the Chief Justice to choose seven judges to pass on similar issues. That statute, however, limits the authority of the judge over such issues by prescribing a "clearly erroneous" standard of review. The statute will encourage the development of foreign intelligence expertise among these seven judges by empowering them to hear all foreign intelligence warrant requests.

Perhaps most crucially, the executive branch not only has superior expertise in the area of foreign intelligence, it is also constitutionally designated as the pre-eminent authority in foreign affairs. *See First National Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 765-68, 92 S.Ct. 1808, 1812-1814, 32 L.Ed.2d 466 (1972); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302, 38 S.Ct. 309, 310, 62 L.Ed. 726 (1918). The President and his deputies are charged by the constitution with the conduct of the foreign policy of the United States in times of war and peace. *See United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255 (1936). Just as the separation of powers in *Keith* forced the executive to recognize a judicial role when the President conducts domestic security surveillance, 407 U.S. at 316-18, 92 S.Ct. at 2136-2137, so the separation of powers requires us to acknowledge the principal responsibility of the President for foreign affairs and concomitantly for foreign intelligence surveillance.

In sum, because of the need of the executive branch for flexibility, its practical experience, and its constitutional competence, the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance. *Accord, United States v. Butenko*, 494 F.2d 593 (3 Cir.), *cert. denied sub nom., Ivanov v. United States*, 419 U.S. 881, 95 S.Ct. 147, 42 L.Ed.2d 121 (1974); *United States v. Brown*, 484 F.2d 418 (5 Cir. 1973), *cert. denied*, 415 U.S. 960, 94 S.Ct. 1490, 39 L.Ed.2d 575 (1974); *United States v. Clay*, 430 F.2d 165 (5 Cir. 1970), *rev'd on other grounds*, 403 U.S. 698, 91 S.Ct. 2068, 29 L.Ed.2d 810 (1971).[4] *Contra, Zweibon v. Mitchell*, 516 F.2d 594

[4]Since the surveillance was conducted in this case, Congress has enacted the Foreign Intelligence Surveillance Act of 1978, 50

[footnote continued]

(D.C. Cir. 1975) (dictum in plurality opinion in case involving surveillance of domestic organization having an effect on foreign relations but acting neither as the agent of nor in collaboration with a foreign power).

U.S.C. § 1801 *et seq.* That statute requires that executive officials seek prior judicial approval for some foreign intelligence surveillance. The Act does not, however, transport the traditional Fourth Amendment warrant requirement unaltered into the foreign intelligence field. The statute does not contain a blanket warrant requirement; rather, it exempts certain categories of foreign intelligence surveillance. 50 U.S.C. § 1802. Nor does the statute require the executive to satisfy the usual standards for the issuance of a warrant; the executive need demonstrate only probable cause that the target is a foreign power or a foreign agent and, in the case of United States citizens and resident aliens, that the government is not clearly erroneous in believing that the information sought is the desired foreign intelligence information and that the information cannot be reasonably obtained by normal methods. 50 U.S.C. § 1805, § 1804(a)(7)(E). Finally, the statute empowers the Chief Justice to designate seven judges to hear the requests for foreign intelligence warrants and thus creates a special group of judges who will develop expertise in this arcane area. 50 U.S.C. § 1803.

While the Act suggests that it is possible for the executive branch to conduct at least some types of foreign intelligence surveillance while being subject to a warrant requirement, the complexity of the statute also suggests that the imposition of a warrant requirement, beyond the constitutional minimum described in this opinion, should be left to the intricate balancing performed in the course of the legislative process by Congress and the President. The elaborate structure of the statute demonstrates that the political branches need great flexibility to reach the compromises and formulate the standards which will govern foreign intelligence surveillance. Thus, the Act teaches that it would be unwise for the judiciary, inexpert in foreign intelligence, to attempt to enunciate an equally elaborate structure for core foreign intelligence surveillance under the guise of a constitutional decision. Such an attempt would be particularly ill-advised because it would not be easily subject to adjustment as the political branches gain experience in working with a warrant requirement in the foreign intelligence area.

However, because individual privacy interests are severely compromised any time the government conducts surveillance without prior judicial approval, this foreign intelligence exception to the Fourth Amendment warrant requirement must be carefully limited to those situations in which the interests of the executive are paramount. First, the government should be relieved of seeking a warrant only when the object of the search or the surveillance is a foreign power, its agent or collaborators. *Cf. Zweibon v. Mitchell,* 516 F.2d 594, 613 n.42 (D.C. Cir. 1975). In such cases, the government has the greatest need for speed, stealth, and secrecy, and the surveillance in such cases is most likely to call into play difficult and subtle judgments about foreign and military affairs. When there is no foreign connection, the executive's needs become less compelling; and the surveillance more closely resembles the surveillance of suspected criminals, which must be authorized by warrant. Thus, if the government wishes to wiretap the phone of a government employee who is stealing sensitive documents for his personal reading or to leak to a newspaper, for instance, the absence of a foreign connection and the importance of individual privacy concerns contained within the Fourth Amendment lead to a requirement that the executive secure advance judicial approval for surveillance. *See Zweibon v. Mitchell,* 516 F.2d 594, 703-04 (D.C. Cir. 1975) (Wilkey, J., concurring and dissenting).

The surveillance in this case clearly satisfied this limitation upon the foreign intelligence exception to the warrant requirement. Krall, the government agent, received a letter of introduction to Truong through Dong, the president of the Vietnamese Association in Paris. According to Krall, Truong gave her documents to carry back to Dong, who handed the documents to

representatives of the Vietnamese government. In addition, Krall testified that the Vietnamese ambassador to the United Nations told her that Truong had volunteered to obtain documents for the Vietnamese government. Moreover, Krall stated that Truong gave her documents to deliver to Phan Thanh Nam, head of the Vietnamese mission in Paris, who in turn gave her a letter for Truong. Obviously, there was ample evidence that tended to show collaboration with Vietnam on the part of Truong.

Second, as the district court ruled, the executive should be excused from securing a warrant only when the surveillance is conducted "primarily" for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution. We thus reject the government's assertion that, if surveillance is to any degree directed at gathering foreign intelligence, the executive may ignore the warrant requirement of the Fourth Amendment.

The defendants urge that the "primarily" test does not go far enough to protect privacy interests. They argue that the government should be able to avoid the warrant requirement only when the surveillance is conducted "solely" for foreign policy reasons. The proposed "solely" test is unacceptable, however, because almost all foreign intelligence investigations are in part criminal investigations. Although espionage prosecutions are rare, there is always the possibility that the targets of the

investigation will be prosecuted for criminal violations.[5] Thus, if the defendants' "solely" test were adopted, the executive would be required to obtain a warrant almost every time it undertakes foreign intelligence surveillance, and, as indicated above, such a requirement would fail to give adequate consideration to the needs and responsibilities of the executive in the foreign intelligence area.

In this case, the district court concluded that on July 20, 1977, the investigation of Truong had become primarily a criminal investigation. Although the Criminal Division of the Justice Department had been aware of the investigation from its inception, until summer the Criminal Division had not taken a central role in the investigation. On July 19 and July 20, however, several memoranda circulated between the Justice Department and the various intelligence and national security agencies indicating that the government had begun to assemble a criminal prosecution. On the facts of this case, the district court's finding that July 20 was the critical date when the investigation became primarily a criminal investigation was clearly correct.

Therefore, because there was more than enough evidence to indicate that Truong had collaborated with the Vietnamese government and because the district court did not err in choosing July 20 as the date when the investigation became primarily a criminal investigation, we do not disturb the decision of the district court

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[5]As Attorney General Bell testified at the hearing on the motion to suppress the fruits of the surveillance: "Let me say that every one of these counterintelligence investigations involved, nearly all of them that I have seen, involves crime in an incidental way. You never know when you might turn up with something you might want to prosecute."

to exclude all evidence obtained through the surveillance after July 20 but to permit the government to introduce evidence secured through the surveillance before July 20.

Because the Fourth Amendment warrant requirement is a critical constitutional protection of individual privacy, this discussion should conclude by underscoring the limited nature of this foreign intelligence exception to the warrant requirement which we recognize in the instant case. The exception applies only to foreign powers, their agents, and their collaborators. Moreover, even these actors receive the protection of the warrant requirement if the government is primarily attempting to put together a criminal prosecution. Thus, the executive can proceed without a warrant only if it is attempting primarily to obtain foreign intelligence from foreign powers or their assistants. We think that the unique role of the executive in foreign affairs and the separation of powers will not permit this court to allow the executive less on the facts of this case, but we also are convinced that the Fourth Amendment will not permit us to grant the executive branch more.

B. *Reasonableness of the Surveillance*

Even if a warrant is not required, the Fourth Amendment requires that the surveillance be "reasonable." The reasonableness of the surveillance is determined by examining the circumstances of the particular case. *Scott v. United States,* 436 U.S. 128, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978).

For seventy days prior to July 20, FBI agents intercepted all of Truong's phone calls; and, for almost as long a period, the agents listened to Truong's conversa-

tions with visitors in his apartment.[6] As the district court observed, the surveillance was nonetheless reasonable, and we agree.

The purpose of the surveillance was to determine Truong's source or sources for government documents. Thus, it was necessary to intercept all his calls, because the government agents could never be sure whether a particular caller would reveal that he was a source of the documents sometime during his conversation with Truong. As well, when the government eavesdrops on clandestine groups like this one, investigators often find it necessary to intercept all calls in order to record possible code language or oblique references to the illegal scheme. *See United States v. Clerkley*, 556 F.2d 709 (4 Cir. 1977), *cert. denied sub nom. London v. United States*, 436 U.S. 930, 98 S. Ct. 2830, 56 L.Ed.2d 775 (1978) (approving blanket surveillance of numbers operation in order to determine the participants). Thus, on the facts of this case, the surveillance conducted by the government agents was reasonable.[7]

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[6]The FBI surveillance continued for over 260 days. Because the district court suppressed all evidence obtained from the surveillance after July 20, only the seventy-day period preceding that date is relevant. The district court also ruled that the blanket surveillance after July 20 was unreasonable, because the government had succeeded in identifying Humphrey as the sole source of the documents by that date.

[7]In addition to the surveillance of Truong, the government installed a secret video tape camera in Humphrey's office at the United States Information Agency. In his brief, Humphrey does not discuss this intrusion at length, perhaps because the evidence obtained from the video tape did not play an important role at trial. In any case, we affirm the ruling of the district court that the video-taping was reasonable up to July 20, because the FBI took steps to minimize the intrusion and because the taping was necessary to determine how Humphrey handled government documents while at work.

C. *Package Search*

The FBI and the CIA searched one of the packages Truong sent to Paris by Krall without either the authorization of the Attorney General or a search warrant. Because the government agents did not receive executive authorization, the foreign intelligence exception to the warrant requirement does not legitimate this search. Nevertheless, because Truong did not have a legitimate expectation of privacy in the package, *see United States v. Rabinowitz*, 339 U.S. 56, 65-66, 70 S. Ct. 430, 435, 94 L. Ed. 653 (1950), the district court did not err in permitting the contents of the package to be admitted into evidence.

The package of documents was contained within an unsealed manila envelope. Inside the envelope was a transparent bookbag, loosely tied with twine. Although the documents were partially shielded from view by opaque pieces of paper, some parts of the documents could be seen through the bookbag. Thus, Truong had not made a diligent effort to conceal the documents from view. Moreover, Truong knew that this flimsily wrapped package would cross at least two national boundaries on its way to Paris. This risk of inspection when Krall left the United States and when she entered France militates against any expectation of privacy by Truong. *See United States v. Ramsey*, 431 U.S. 606, 97 S. Ct. 1972, 52 L.Ed.2d 617 (1977). Therefore, because the package was poorly wrapped and because it was destined for foreign delivery, Truong could not have harbored a reasonable expectation that the contents of the package would remain undisclosed; and consequently neither a

search warrant nor executive authorization was necessary for this search.[8]

III.

The defendants were convicted of several violations of the espionage statutes and related provisions. Truong and Humphrey raise a number of challenges to these convictions.

A. *Espionage Statutes*

The jury found that the defendants had violated three espionage provisions, 18 U.S.C. § 794(a), § 794(c), and § 793(e). Two principal objections are made by the defendants to their convictions under these statutes, and we will consider them in order:

(1) *National Defense*

A common prerequisite for a conviction under each of the statutes is that the defendant transmit information "relating to the national defense." The defendants argue that this phrase limits the reach of the statutes to military matters and assert that none of the materials transmitted by Truong and Humphrey related to the "national defense" thus defined.

Contrary to the defendants' argument, the legislative history of the espionage statutes demonstrates that Congress intended "national defense" to encompass a

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[8]A letter and another package were searched without a warrant but with executive authorization. Because both of those searches took place before July 20, in accordance with our resolution of the issue of a foreign intelligence warrant exception, we conclude that neither of these warrantless searches violated the Fourth Amendment.

broad range of information and rejected attempts to narrow the reach of the statutory language. *See* Edgar and Schmidt, The Espionage Statutes and Publication of Defense Information, 73 Colum. L. Rev. 929, 972-74 (1973). Resting on a similar reading of the intent of Congress, the Supreme Court in *Gorin v. United States*, 312 U.S. 19, 28, 61 S. Ct. 429, 434, 85 L. Ed. 488 (1941), underscored the breadth of "national defense" as used in the espionage statutes: "National Defense, the Government maintains, 'is a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness.' We agree that the words 'national defense' in the Espionage Act carry that meaning." Thus, the defendants' attempt to constrict the ambit of "national defense" to strictly military matters cannot succeed. *See United States v. Boyce*, 594 F.2d 1246 (9 Cir. 1979), *cert. denied*, 444 U.S. 855, 100 S. Ct. 112, 62 L.Ed.2d 73 (1980).

Under either the strict definition urged by the defendants or the broad definition endorsed by the Supreme Court in *Gorin*, the defendants transmitted information which related to the national defense. The materials sent to Paris included information which related directly to the United States military, including information about Vietnamese designs on Thailand, American POW's in Indochina, and American military materiel which had fallen into the hands of the Vietnamese government. In addition, under the broader definition of national defense, the packages contained a great deal of national defense information, in the form of names of United States sources for intelligence about the Vietnamese government. On the facts of this case, there can be no

doubt that the information transmitted was information "relating to the national defense."[9]

(2) *Intent*

The defendants base their second principal objection upon their claim that a constitutional conviction under the espionage statutes must include a finding of evil intent, *i.e.*, intent to injure the United States or to aid a foreign nation. They contend that their convictions under § 794(a) and § 794(c) are invalid because the trial judge failed to instruct the jury that a finding of evil intent was essential and that their convictions under § 793(e) are invalid because § 793(e) itself does not contain evil intent as an element necessary for a conviction.

Under § 794(a) and § 794(c), the prosecution must prove that the defendant acted "with intent or reason to believe" that transmission of the information will injure

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[9]The defense raises another challenge to the espionage convictions based upon the district court's instruction on classification of documents. An examination of the instruction reveals, however, that it was entirely proper. First, the district judge informed the jury that it might "consider the testimony that the documents were classified." Certainly the classification of the documents was relevant to the question of whether they related to the "national defense." *See United States v. Dedeyan*, 584 F.2d 36, 40–41 (4 Cir. 1978). Second, the district judge correctly instructed the jury that the official nature of the documents would be pertinent to whether their transmission would injure the United States or aid a foreign nation. Finally, the jury was told that the defendants would not be guilty of transmitting national defense information if the information were availabe in the public domain. Thus, the district court did not place too great an emphasis on the classification of the documents or their official nature and specifically instructed the jury that transmission of publicly available information did not fall within the statutory prohibitions.

the United States or aid a foreign nation. This scienter requirement is critically important, because the Supreme Court relied upon it in *Gorin*, 312 U.S. at 26-27, 61 S. Ct. at 433-434 (1941), to rebut a claim that the espionage statutes were unconstitutionally overbroad. The defendants insist that the district judge's instructions in this case diluted the important scienter requirement by suggesting that the defendant could be convicted for mere negligence. This contention is insubstantial.

The district judge instructed the jury that to convict defendants it must find that they acted "willfully and with an intent *or* reason to believe" that the information would be used to injure the United States or to aid a foreign power. The jury was also told that "reason to believe" meant that a defendant must be shown to have known facts from which he concluded or reasonably should have concluded that the information could be used for the prohibited purposes. The latter did not mean, however, that the jury could convict merely upon a finding that a defendant acted "negligently." Rather, the jury was instructed that a defendant must act "willfully" which the jury was told meant "voluntarily and intentionally and with a specific intent to do something the law forbids."

Section 793(e) does not contain the same strong scienter language of § 794(a). Rather, it requires only that the defendant have "reason to believe" that the national defense information could be used to harm the United States or to aid a foreign nation. The defendants contend that this less stringent language renders the statute unconstitutionally overbroad. *See generally* Edgar & Schmidt, *supra*, at 998-1020.

Even though § 793(e) does not include scienter language identical to the language of § 794(a), it does

require that the accused "willfully" transmit the information. Evidently relying upon this language, the trial judge instructed the jury that it must find that the defendants acted in bad faith before it could convict, and defined bad fatih as a "design to mislead or deceive another. That is, not prompted by an honest mistake as to one's duties, but prompted by some personal or underhanded motive." This instruction more than cured any possible overbreadth of § 793(e).[10] *See Gorin v. United States,* 312 U.S. 19, 27-28, 61 S. Ct. 429, 433-434, 85 L. Ed. 488 (1941); *United States v. Dedeyan,* 584 F.2d 36 (4 Cir. 1978); Edgar & Schmidt, *supra,* at 1020.[11]

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[10]Section 793(e) contains another possible ambiguity. It punishes only those who have "unauthorized possession" of national defense information. The trial judge provided adequate content for this phrase by advising the jury that a person would have authorized possession if he had an appropriate security clearance and if he gained access to the document because it was necessary to the performance of his official duties.

[11]Defendants make two other objections to the espionage convictions which we find without merit. Contrary to the defendant's contention, venue for § 794(a) and § 793(e) charges was properly laid in the Eastern District of Virginia. Even though Humphrey gave Truong the documents in the District of Columbia, Truong passed them to Krall in Alexandria, Virginia. Since Krall was the means by which the documents were carried to the Vietnamese in Paris, the proscribed act, the act of transmission, took place in Alexandria. *See United States v. Walden,* 464 F.2d 1015 (4 Cir.), *cert. denied,* 409 U.S. 867, 93 S. Ct. 165, 34 L.Ed.2d 116 (1972).

Finally, the district court included all the elements of the espionage offenses in its charge and did not include only two elements as the defendants insist.

B. *Espionage-Related Statutes*

In addition to their convictions under the espionage statutes, Truong and Humphrey were found guilty of violating two related criminal statutes, 18 U.S.C. § 951 and 50 U.S.C. § 783(b) and (c).

(1) *Foreign Agent*

The jury found that Truong and Humphrey had acted in the United States as unregistered agents of the Socialist Republic of Vietnam, a violation of 18 U.S.C. § 951. The defendants make two challenges to their convictions. First, they argue that the statute violated their privilege against self-incrimination because they would have been forced to confess participation in illegal espionage if they had registered. A registration provision violates the Fifth Amendment, however, only if it is directed at a class of persons who are inherently suspect of illegal activities. A neutral registration requirement, such as this one directed at representatives of foreign nations, does not offend the Fifth Amendment. *See United States v. Walden*, 411 F.2d 1109 (4 Cir.), *cert. denied*, 396 U.S. 931, 90 S. Ct. 271, 24 L.Ed.2d 230 (1969).

The defendants also contend that § 951 is impermissibly vague and overbroad. Their principal objection is to the word "agent." "Agent" as used in this context, however, is a readily understandable term which provides adequate notice of the conduct proscribed by the statute.

D. *50 U.S.C. § 783(b) and (c)*

Truong and Humphrey were convicted of conspiracy to violate 50 U.S.C. § 783(b) and (c). Section 783(b) makes it unlawful for a United States government employee knowingly to communicate classified information

to an agent of a foreign government. Conversely, § 783(c) makes it illegal for an agent of a foreign government knowingly to receive classified information from a United States government employee. The defendants contest their convictions under this statute on several grounds.

Most of their contentions were answered adequately in *Scarbeck v. United States*, 317 F.2d 546 (D.C. Cir. 1962), *cert. denied*, 374 U.S. 856, 83 S. Ct. 1897, 10 L.Ed.2d 1077 (1963). Truong argues that he cannot be bound by the classification system because he was not a government employee. But he cannot hide behind his civilian status when he encouraged a government employee to copy classified documents. Second, contrary to Truong's argument, the fact that the President did not personally classify the documents does not place them outside the scope of the statute. Finally, we find no unconstitutional ambiguity in the phrase "of a kind which shall have been classified" or in "agent or representative of a foreign government."

IV.

Defendants made several objections at trial regarding the district court's application of the Jencks Act and assert them on appeal. Two of those objections merit extended discussion.

A. *The Final Group of Documents*

Robert Hall was Krall's CIA case officer. He made reports of his conversations with Krall. Near the end of trial, the prosecution presented the district judge with a large number of Hall's reports and cables concerning his conversations with Krall. Because the government produced the material at a late date and because there

was a large number of documents, the district judge was candid in stating that he was unable to examine them adequately. He said: "I have been through it in a cursory manner, enough to determine that there is nothing . . ., in very cursory reading [that] is any different than [Jencks Act material already supplied to the defense]." The judge revealed his irritation with the prosecution for producing the documents tardily and thereby preventing him from fully carrying out his responsibilities: "Presuming the Court [evidently the Fourth Circuit] finds to the contrary, the Government is going to lose this case just because somebody in the CIA was being cute."

As these statements of the district judge reflect, there is no clear finding, on the existing record, of whether the last group of documents contained statements which should have been produced under the Jencks Act. They were not given the careful scrutiny the district court felt was necessary to make a confident decision. However, we decline the district judge's invitation to inspect the documents ourselves, and, instead, remand the case so that the district court can carefully screen the documents. We leave this task to the district judge because the district courts, not the appellate courts, are entrusted with the duty of examining documents for Jencks Act material, *Campbell v. United States*, 373 U.S. 487, 493, 83 S.Ct. 1356, 1360, 10 L.Ed.2d 501 (1963) (*Campbell II*). In addition, since the district judge is intimately familiar with the other Jencks Act material produced at trial, he is better equipped than we to decide whether any Jencks Act statements included within the documents are merely cumulative so that the failure to produce them at trial was not prejudicial to the defendants.

The need for a remand in this case is underscored by the fact that the government has conceded in its brief before us that the documents contain perhaps three Jencks Act statements by Krall. The government's description of one of these statements suggests that one of Krall's conversations with Hall may have differed from her testimony at trial. Krall testified that Phan Thanh Nam, the head of the Vietnamese Paris mission, told her that Truong was among "our people in Washington." The government states in its brief that Hall's report recounts Krall's conversation with Nam without mentioning a reference to Truong. This document could thus contain a Jencks Act statement which might have been used to impeach Krall's testimony.

We do not pass judgment, however, on the significance of the government's failure to produce this possible Jencks Act statement. We leave that decision to the "good sense and experience of the district judge", *Palermo v. United States*, 360 U.S. 343, 353, 79 S. Ct. 1217, 1225, 3 L.Ed.2d 1287 (1959). If the district court decides that the documents do not contain Jencks Act material, or if the district court finds Jencks Act material but decides that the prosecution's failure to produce it was harmless error,[12] the district court should enter a new judgment of conviction. If, however, the district court finds Jencks Act material and concludes that denial of it was not harmless error, it should vacate the judgments of conviction in order that the defendants may obtain a new trial. *See Goldberg v. United States*,

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[12]The district court will, of course, be strict in its application of harmless error doctrine to any nonproduction of Jencks Act material. *See Goldberg v. United States*, 425 U.S. 94, 111 n.21, 96 S. Ct. 1338, 1348 n.21, 47 L.Ed.2d 603 (1976).

425 U.S. 94, 111-12, 96 S.Ct. 1338, 1348-1349, 47 L.Ed.2d 603 (1976).

B. *Destruction of Krall's Reports*

Krall made some written reports to Hall detailing her activities while in Paris. These reports included descriptions of her actions relating to Truong. At trial, defendants attempted to obtain these reports, under 18 U.S.C. § 3500(e)(1), in order to test Krall's courtroom description of the Paris incidents. The prosecution was unable to produce Krall's reports, however, because Hall had destroyed them according to routine CIA procedures before any criminal prosecution was contemplated. The defendants argue that the district court should have imposed sanctions upon the prosecution for the destruction of the reports by the CIA.

The destruction of Jencks Act material may violate at least the spirit of the Act, even if the material is destroyed without bad faith following a routine procedure. *See United States v. Missler,* 414 F.2d 1293, 1304-05 (4 Cir. 1969), *cert. denied,* 397 U.S. 913, 90 S.Ct. 912, 25 L.Ed.2d 93 (1970); *United States v. Johnson,* 337 F.2d 180, 201-02 (4 Cir. 1964), *aff'd,* 383 U.S. 169, 86 S.Ct. 749, 15 L.Ed.2d 681 (1966). Whatever the Jencks Act consequences of the destruction of "statements" by criminal investigators, the Jencks Act was not violated in this case, because the reports were destroyed outside the context of a criminal investigation.

Krall acted as both an FBI agent and a CIA agent. As a CIA operative, she provided a variety of information regarding the Vietnamese government, not limited to the flow of documents from Truong to Paris. Her reports to Hall, her CIA case officer, were part of her

intelligence-gathering function for the CIA. The reports were destroyed by Hall, acting as a CIA intelligence functionary, in accordance with CIA practice designed to preserve the secrecy of sensitive foreign operations. Krall's reports were thus prepared and destroyed in conjunction with her role as an intelligence agent, not as an aspect of her role as an informer in a criminal investigation. Therefore, even under the decisions of those courts which have imposed sanctions for routine destruction of Jencks Act statements by criminal investigators, *see, e.g., United States v. Carrasco*, 537 F.2d 372 (9 Cir. 1976), the prosecution would not be subject to sanctions for the destruction of Krall's reports. In this case, the district court did not err when it refused to impose sanctions on the prosecution for the destruction of this possible Jencks Act material.[13]

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[13]We reject two other Jencks Act claims raised by the defendants. First, the defendants contend that the district judge should have held a hearing under *Campbell v. United States*, 365 U.S. 85, 81 S.Ct. 421, 5 L.Ed.2d 428 (1961) (*Campbell I*), to determine whether documents prepared by Hall contained Jencks Act statements of Krall. Unlike the situation in *Campbell I*, in this case there was no need for a hearing to gather extrinsic evidence in order to determine whether Hall's reports contained "statements." Because Hall sometimes used quotation marks in his reports, the defense suggested that Hall's reports amounted to a "substantially verbatim recital" of Krall's comments to him. 18 U.S.C. § 3500(e)(2). By reading the reports and examining the context in which the quotation marks were used, the district judge could determine on his own whether the quotation marks enclosed Krall's exact words or whether the quotation marks were used by Hall merely as literary devices. Here, then, no hearing was necessary.

Second, the defendants argue that the district judge withheld Jencks Act material from them because it was classified. Although the district judge commented that there was "a little more burden" in this case than the usual Jencks Act case because the documents

[footnote continued]

V.

The defendants were also convicted of violating 18 U.S.C. § 641. That statute renders criminally liable any person who "converts to his use or the use of another, or without authority, sells, conveys or disposes of any . . . thing of value of the United States." The defendants were convicted under this statute on the theory that they converted government property in the form of classified information when they surreptitiously secured copies of secret documents in the possession of the United States Information Agency.

The defendants argue that their convictions must be reversed because the theft of classified information falls outside the confines of this statute. They contend that information cannot be "converted" because the common law tort of conversion requires that the legitimate owner be deprived of possession, *see Pearson v. Dodd*, 410 F.2d 701 (D.C. Cir.), *cert. denied*, 395 U.S. 947, 89 S. Ct. 2021, 23 L.Ed.2d 465 (1969). In this case, the defendants did not "convert" the classified information by copying the documents, their theory goes, since the United States Information Agency was not denied access to its information in the process. Furthermore, the defendants assert, information is an intangible not encompassed by § 641, which speaks of tangible "things" of value.[14] Therefore, the defendants conclude that,

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were classified, he did not employ a standard that would deny the defendants information to which they were entitled under the Jencks Act. Rather, he indicated by his comments only that he applied the Jencks Act in this instance more strictly than he would in the ordinary case. In fact, the district judge admitted that he had "turned over things arguably useful though repetitious."

[14]One case has limited § 641 to tangibles. *Chappell v. United States*, 270 F.2d 274 (9 Cir. 1959). That case held that an Air

[footnote continued]

because they obtained an intangible incapable of conversion, their acts were not prohibited by the limited terms of § 641.

For reasons set forth in the separate opinion of Judge Russell in which Judge Hall concurs, the majority has concluded that, under the concurrent sentence rule, this contention of the defendants should not be considered. I think otherwise, and I will state first my reasons why I think the concurrent sentence doctrine should not be invoked to bar review and next my views with respect to the merits of defendants' contention.

Whatever the continuing vitality of the concurrent sentence doctrine in other circuits, I thought that it was decently interred in this circuit by the decision in *Close v. United States,* 450 F.2d 152, 155 (4 Cir. 1971), *cert. denied,* 405 U.S. 1068, 92 S. Ct. 1513, 31 L.Ed.2d 799 (1972), where we said "there is no legal reason why a concurrent sentence, attached to a longer, valid sentence, and already served, and based on what must fairly be deemed constitutionally impermissible evidence, should be left standing and we direct that it be vacated." If this was true when the litigation was a collateral attack on a conviction, the sentence for which had been fully served, I think it much more true here where the validity of the conviction is before us on direct appeal and the sentence is as yet unserved. That the defect in the conviction in *Close* was constitutional while here the claimed defect is statutory is, to me, a distinction without a difference. And I am not alone in my reading of *Close.* It has been so read as conclusively rejecting the concurrent sentence

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Force officer did not violate § 641 by appropriating the labor of an airman while on duty, because the airman's labor was an intangible outside the scope of § 641.

doctrine in *United States v. Vargas*, 615 F.2d 952, 957 (2 Cir. 1980), and in Note, The Concurrent Sentence Doctrine After *Benton v. Maryland*, 7 U.C.L.A.–Alaska L. Rev. 282, 294, 306 (1978). Indeed, what was decided in *Close* is so clear that I am led to question the authority of the majority of this panel to overrule the decision of a previous panel of this court. Heretofore such a change of direction, absent a supervening superseding decision of the Supreme Court, has been restricted to an in banc court.

But even if the doctrine has continuing utility as a means of avoiding the expenditure of judicial resources on the unnecessary decision of an issue, I think that it is improper to invoke it here for at least two reasons. First, as the government has sought to apply § 641, there is in issue not merely the defendants' guilt or innocence, but, as I later demonstrate, substantial first amendment considerations. In my view, proper concern for the protection of these important considerations should make us more hesitant to invoke the concurrent sentence doctrine here than in the run-of-the-mill criminal case.

Second, this is not a case in which defendants' other convictions are unqualifiedly affirmed. To the contrary, we are unanimous in remanding the case to the district court for consideration of whether Jencks Act material was improperly denied the defendants with the direction that, if such a denial is found and determined to be prejudicial, defendants must be tried anew. Defendants' guilt of the other offenses, then, has not been finally settled. Should there be a new trial, manifestly that trial should be limited to the counts of the indictment not based on § 641 if there is merit in defendants' contention as to the limited scope of § 641. We should avoid the risk of any error in the § 641 aspect of the case which

might have a prejudicial effect on the validity of other possible convictions. While I am generally in agreement with the dissenting view in *United States v. Boyce*, 594 F.2d 1246, 1252 (9 Cir. 1979), *cert. denied*, 444 U.S. 855, 100 S. Ct. 112, 62 L.Ed.2d 73 (1980) rather than that of the majority in that case, the instant case is even a stronger one in which to reject application of the concurrent sentence doctrine. Here, the validity of the convictions under § 641 is a real issue and not an academic exercise having no practical effect as the majority tries to demonstrate.

When brought to the merits of defendants' contention, my views are as follows:

The legislative history of § 641 does not mention the application of the statute to the theft of government information. Section 641 is a venerable criminal provision; its predecessors were first enacted in 1875. The statute was codified in its present form in 1948 when the criminal code was revised. As might be expected, the 19th century legislative history of the predecessor statutes does not address the application of the statute to government information, almost certainly because a Congress of that era would not foresee this issue. *See United States v. Lambert*, 446 F. Supp. 890, 893 (D. Conn. 1978), *aff'd sub nom. United States v. Girard*, 601 F.2d 69 (2 Cir. 1979). And, because the 1948 revision was merely a consolidation of several provisions of the 1940 code, Congress did not discuss the substantive reach of § 641 when the statute was enacted in its current form. In short, the legislative history reveals that Congress has never directly considered the application of § 641 to government information. In enacting § 641 and its predecessors, Congress did not express an intent that the unauthorized disclosure of government information

be either included within or excluded from the criminal prohibitions of § 641.

While the legislative history of the statute is inconclusive, the language of the statute and the leading Supreme Court decision dealing with § 641 establish that the statute should not be construed as narrowly as the defendants would like. The language of § 641 itself is all-inclusive. By appending "thing of value" onto the list of "any record, voucher, [or] money," Congress certainly did not evince an intent to restrict the reach of § 641. Nor did Congress manifest a desire that § 641 not include some wrongful appropriations of government property when it chose the phrase "embezzles, purloins, or knowingly converts . . ., or without authority, sells, conveys or disposes."

In *Morissette v. United States*, 342 U.S. 246, 271, 72 S. Ct. 240, 254, 96 L. Ed. 288 (1952), the Supreme Court confirmed that Congress intended the language of § 641 to sweep broadly:

> What has concerned codifiers of the larceny type offense is that gaps or crevices have separated particular crimes of this general class and guilty men have escaped through the breaches. The books contain a surfeit of cases drawing fine distinctions between slightly different circumstances under which one may obtain wrongful advantages from another's property. The codifiers wanted to reach all such instances.[15]

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[15]Another passage conveys similar thoughts: "The purpose which we here attribute to Congress . . . demonstrates that the serious problem in drafting such a statute is to avoid gaps and loopholes between offenses." 342 U.S. at 272-73, 72 S. Ct. at 254.

[footnote continued]

Likewise, in an earlier footnote, the Court explained: "The history of § 641 demonstrates that it was to apply to acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered might not be found to fit their fixed definitions." 342 U.S. at 266 n.28, 72 S.Ct. at 253 n.28. Thus, the legislative design as revealed by the language of the statute and by *Morissette* belies the defendants' attempt to narrow the statute to the taking of certain categories of property and to engraft upon § 641 the technical definition of the tort of conversion. *See United States v. Girard*, 601 F.2d 69 (2 Cir. 1979), *aff'd United States v. Lambert*, 446 F. Supp. 890 (D. Conn. 1978).[16]

In the first part of the opinion, the Court held that Congress did not intend to omit criminal intent as an element of the crime proscribed in § 641 by failing to include an explicit mention of criminal intent. The Court concluded that Congress must have been aware that the criminal acts listed in § 641 had at common law always included criminal intent as an essential element and that therefore the Court would not infer that Congress had deleted criminal intent as an element of the crimes. 342 U.S. at 263, 72 S.Ct. at 249. This holding that Congress meant to include the critical element of criminal intent when it codified these common law crimes does not undercut the Court's separate holding that Congress intended to criminalize a broad range of wrongful takings, beyond the confines of the common law, which were committed with criminal intent.

[16] *See also United States v. Friedman*, 445 F.2d 1076 (9 Cir.), *cert. denied sub nom. Jacobs v. United States*, 404 U.S. 958, 92 S.Ct. 326, 30 L.Ed.2d 275 (1971). One district court has concluded that § 641 does not include the unauthorized copying of government documents. *United States v. Hubbard*, 474 F. Supp. 64, 79-80 (D.D.C. 1979) (dicta).

Courts which have interpreted other criminal statutes containing phrases similar to "thing of value" have decided that the statutory language included both tangible and intangible property. *See, e.g., United States v. Zouras*, 497 F.2d 1115 (7 Cir. 1974); *United States v. Bottone*, 365 F.2d 389 (2 Cir.), *cert. denied*, 385 U.S. 974, 87 S.Ct. 514, 17 L.Ed.2d 437 (1966).

While I would thus conclude that in some circumstances § 641 may encompass the unauthorized disclosure of government information, § 641 must be applied to the theft of government information with extreme care. Two particularly acute problems arise when the statute is used to punish defendants who have stolen government information.

First, because the statute was not drawn with the unauthorized disclosure of government information in mind, § 641 is not carefully crafted to specify exactly when disclosure of government information is illegal. The crucial language is "without authority." The precise contours of that phrase are not self-evident. This ambiguity is particularly disturbing because government information forms the basis of much of the discussion of public issues and, as a result, the unclear language of the statute threatens to impinge upon rights protected by the first amendment. Under § 641 as it is written, no precise standard controls the exercise of discretion by upper level government employees when they decide whether to forbid or permit the disclosure of government information. *See* Nimmer, National Security Secrets v. Free Speech: The Issues Left Undecided in the Ellsberg Case, 26 Stan. L. Rev. 311, 322 (1974). Consequently, upper level government employees might use their discretion in an arbitrary fashion to prevent the disclosure of government information; and government employees, newspapers, and other could not be confident in many circumstances that the disclosure of a particular piece of government information was "authorized" within the meaning of § 641. Thus, the vagueness of the "without authority" standard could pose a serious threat to public debate of national issues, thereby bringing the constitutional validity of § 641 into question because of its

chilling effect on the exercise of first amendment rights. *See Cox v. Louisiana*, 379 U.S. 536, 85 S. Ct. 453, 13 L.Ed.2d 471 (1965).[17]

The government responds to this first amendment concern by insisting that "without authority" has very specific content when § 641 is applied to the disclosure of classified information. When a defendant is charged with stealing classified information, the government submits, "without authority" means that the defendant failed to comply with the regulations governing disclosure of classified information. Because those regulations are highly detailed and specific, the government concludes, "without authority" is not a vague standard in the context of classified information.

The Second Circuit has recently adopted the approach advocated by the government when it ruled on the application of § 641 to another category of government information. In *United States v. Girard*, 601 F.2d 69 (2 Cir. 1979), *aff'g United States v. Lambert*, 446 F. Supp. 890 (D. Conn. 1978), the defendants were charged with selling information obtained from the computers of the Drug Enforcement Administration including the identities of informants and the status of government drug investigations. The court determined that § 641 encompassed the unauthorized disclosure of government information. The court also confronted the vagueness and the resulting first amendment difficulties contained within the statute. The court corrected these defects

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[17]Of course, I express no opinion whether § 641 as applied to classified information would in fact violate the first amendment. I merely note the apparent first amendment difficulties raised by the vagueness of the statute when it is applied to the theft of government information.

by reading "without authority" to embody the pertinent Justice Department regulations and the Agents Manual of the Drug Enforcement Administration, which specifically forbade the disclosure of the government information at issue in that case. By thus reasonably looking to the concrete definition of "without authority" that governed the disclosure of a particular category of government information, the court eliminated the vagueness of § 641 as applied to the defendants in that case.

This solution for the vagueness of § 641 raises the second of the problems which is caused by the application of § 641 to the theft of government information: the potential for conflict between § 641 and other statutes specifically addressed to the disclosure of government information. Section 641 has not been traditionally employed to punish those who make unauthorized disclosures of government information. In fact, the decision of the Second Circuit in *Girard*, handed down in 1979, was the first circuit decision to face the issue squarely and apply the statute to the theft of government information. Earlier, without much discussion, the Ninth Circuit had permitted a defendant to be convicted under § 641 for disclosing grand jury information. *United States v. Friedman*, 445 F.2d 1076 (9 Cir.), *cert. denied*, 404 U.S. 958, 92 S. Ct. 326, 30 L.Ed.2d 275 (1971). Because Congress was never consciously aware that § 641 would punish the unauthorized disclosure of government information and because this use of § 641 is a relatively recent innovation, courts must be cautious in interpreting § 641 so that it is applied in a manner consistent with the congressional design, if any, expressly governing the disclosure of a particular type of government information.

When the statutes addressed to the disclosure of classified information are examined, it becomes apparent that § 641 cannot, consistent with the congressional framework of criminal statutes explicitly directed at classified information, be applied to punish these defendants for the unauthorized disclosure of classified information.

Congress has legislated frequently and with precision with regard to the unauthorized disclosure of classified information, and it has chosen to punish only certain categories of disclosures and defendants. National defense information is protected from disclosure by the espionage statutes, particularly § 793(a), (b), (c) and § 794. But those statutes only penalize a defendant who acts "with intent or reason to believe that [the information will be used] to the injury of the United States or to the advantage of [a] foreign nation."[18] Classified information is also guarded from unauthorized disclosure by 18 U.S.C. § 798. Section 798 does not contain the strict intent requirement of the espionage statutes; it punishes anyone who acts "knowingly and willfully". But, § 798 makes criminal the disclosure of only one class of classified information, classified information

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[18]Two of the espionage statutes appear to reach much further, and, on first reading, seem to penalize the merely willful disclosure of most classified information. 18 U.S.C. § 793(d) and (e). It has been suggested that Congress did not intend these statutes to have such a broad meaning. *See* Edgar & Schmidt, The Espionage Statutes and Publication of Defense Information, 73 Colum. L. Rev. 929, 1031-57 (1973). I would not need to decide exactly how far these statutes extend. I would need only to hold that, whatever the precise scope of § 793(d) and (e), the general terms of § 641 should not be employed to serve as a broad prohibition against the authorized disclosure of classified information when Congress has chosen to enact a series of criminal statutes directly aimed at classified information.

concerning cryptography and communications. By contrast, 50 U.S.C. § 783(b) makes it unlawful to disclose any classified information. That statute, however, places this strict prohibition only upon government employees,[19] and subjects even government employees to criminal penalties only when the information is communicated to an agent of a foreign government or a member of a Communist organization.[20]

If § 641 were extended to penalize the unauthorized disclosure of classified information, it would greatly alter this meticulously woven fabric of criminal sanctions. Unlike the espionage statutes, § 641 does not contain a stringent intent requirement; it penalizes whomever "embezzles, steals, purloins, or knowingly converts." And, unlike § 798, § 641 would not penalize the disclosure of only a limited category of classified information. Rather, § 641 would outlaw the unauthorized disclosure of any "thing of value", that is, any classified information. Finally, in contrast to 50 U.S.C. § 783(b), the penalties of § 641 would not be placed only on government employees who communicate classified information to foreign agents or Communist operatives. Instead, § 641 would punish all persons; "whoever" disclosed classified information without authority would be subject to criminal penalties.

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[19] *See also* 50 U.S.C. § 783(c), the counterpart of § 783(b), which punishes a foreign agent or member of a Communist organization who receives classified information from a government employee.

[20] *See also* 18 U.S.C. § 793(f), which punishes anyone, "being entrusted with or having lawful possession" of national defense documents, who (1) permits them to be destroyed through gross negligence or (2) fails to report their illegal removal from proper custody.

Thus, if § 641 were extended to the unauthorized disclosure of classified information, it would sweep aside many of the limitations Congress has placed upon the imposition of criminal sanctions for the disclosure of classified information. Section 798 and 50 U.S.C. § 783(b) would be effectively subsumed under the broad language of § 641.[21] In addition, any person who

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[21]When it enacted § 798, Congress certainly did not conceive that § 641 would prevent the unauthorized disclosure of classified information. In fact, the House Report assumed that, other than the predecessor of § 798, the espionage statutes were the only criminal statutes which protected classified information. The House Report explained that the espionage statutes did not provide sufficient protection for classified communications information because under the espionage statutes, "unauthorized revelation of information of this kind can be penalized only if it can be proved that the person making the revelation did so with an intent to injure the United States." H.R. Rep. No. 1895, 81st Cong., 2d Sess. (1950), *reprinted in* [1950] U.S. Code Cong. Serv., pp. 2297, 2298. The Report went on to note that former government employees would not be subject to penalties for disclosing classified communications information:

> During the recent war there were many persons who acquired some information covered by this bill in the course of their duties. Most of these individuals are no longer connected with the services and are not now prohibited from making disclosures which can be most damaging to the security of the United States. They are subject to the temptations of personal gain and of publicity in making sensational disclosures of the personal information within the purview of this act.

Id.

The Report described the congressional response to this security threat by emphasizing the limited nature of the criminal prohibition embodied in § 798:

> This bill makes it a crime to reveal the methods, techniques, and material used in the transmission by this Nation of enciphered or coded messages. It does not control in any

[footnote continued]

willfully disclosed any classified information without authority would be subject to criminal penalties, contrary to the evident intent of Congress expressed in the strict intent requirement inserted into the espionage statutes. It is axiomatic that statutes dealing with the same topic should be read in pari materia in order to further the overall legislative intent expressed in a series of statutes, *see* 2A Sutherland, Statutory Construction § 57.06 (4th ed. 1973), and that axiom is even more forceful in the sensitive area of classified information which has been the subject of frequent congressional concern. Because § 641 would disturb the structure of criminal prohibitions Congress has erected to prevent some, and only some, disclosures of classified information, the general anti-theft statute should not be stretched to penalize the unauthorized disclosure of classified information.[22]

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way the free dissemination of information which might be transmitted by code or cipher.

Id.

Thus, in 1950 Congress felt that, after it enacted § 798, the criminal code would contain two prohibitions against the unauthorized disclosure of classified information: the espionage statutes, which are constricted by their intent requirement, and § 798, which protected one narrow category of classified information. It would greatly disrupt the network of carefully confined criminal prohibitions Congress thought it had enacted in 1950, a network which has remained largely unchanged until the present day, if the courts permitted § 641 to serve as a criminal prohibition against the merely willful unauthorized disclosure of any classified information.

[22] I also note that currently Congress is debating an addition to the criminal code which would make it unlawful for certain persons to disclose another category of classified information, the names of covert agents serving the United States intelligence agencies. *See* S. 2284, 96th Cong., 2d Sess. § 701 (1980). According to the sponsor of the Senate bill, this proposed statute

[footnote continued]

My conclusion is reinforced by the fact that Congress has repeatedly refused to enact a statute which would make criminal the mere unauthorized disclosure of classified information. The present espionage statutes were enacted largely in their present form in 1917 at the request of President Wilson. Although Congress agreed to statutes aimed at espionage, it specifically rejected the request of the President that it enact a criminal statute to punish the publication of defense information in violation of presidential regulations. Concern for public debate of defense issues and distrust of a war-time president's powers converged to defeat the proposal to criminalize the publication of classified information. Edgar & Schmidt, *supra*, at 940–41. Similar attempts were unsuccessful immediately after World War II, in the late 1950's, in the mid 1960's, and in the 1970's.[23]

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would punish only those who have had authorized access to the classified information. The authors of the bill felt that they "should concentrate [their efforts] on those who have abused their trust" because of "reasons relating to constitutional considerations." 126 Cong. Rec. S. 1306 (daily ed. February 8, 1980) (remarks of Sen. Huddleston). If § 641 were applied to classified information, as the government urges in this case, this congressional debate would be to a great extent moot, because § 641 would punish anyone who disclosed any classified information, including the names of covert agents.

[23]When Congress adopted § 798 to protect classified communications information, Congress consciously refrained from enacting a criminal prohibition applicable to disclosures of other categories of classified information:

> This bill is an attempt to provide . . . legislation for only a small category of classified matter, a category which is both vital and vulnerable to an almost unique degree. . . . Under the bill as now drafted there is no penalty for publishing the contents of United States Government communications (except, of course, those which reveal information in the categories directly protected by the bill itself). Even the

[footnote continued]

See Subcomm. on Secrecy and Disclosure of the Senate Select Comm. on Intelligence, 95th Cong., 2d Sess., National Security Secrets and the Administration of Justice 17-19, 22 (Comm. Print 1978). Thus, in the area of national security information, Congress has consciously refrained from making it a crime merely to disclose classified information without authority.

In sum, because a criminal prohibition against the unauthorized disclosure of classified information would be inconsistent with the existing pattern of criminal statutes governing the disclosure of classified information and because Congress has always refused to enact a statute like § 641 applicable to the disclosure of classified information, I would hold that § 641 cannot be interpreted to punish the unauthorized disclosure of classified information. Like the district court in *Lambert*, 446 F. Supp. at 899, I would conclude that the application of § 641 to thefts of government information should be decided upon a case-by-case basis. Here, where the unauthorized disclosure of classified information has been the focus of legislation and constitutional and

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texts of coded Government messages can be published without penalty as far as this bill is concerned, whether released for such publication by due authority of a Government department or passed out without authority or against orders by personnel of a department. In the latter case, of course, the Government personnel involved might be subject to punishment by administrative action but not, it is noted, under the provisions of this bill.

The bill, while carefully avoiding the infringement of civil liberties, extends the protected field covered by the [predecessor of § 798] . . . .

Here, then, is another in a long series of conscious congressional decisions not to render criminal the mere unauthorized disclosure of all categories of classified information.

political debate within Congress, it would be unwise to extend § 641 through judicial interpretation to include this category of information. Whatever the content of "thing of value" in the context of other types of government information, this phrase may not be read to include classified information within § 641.[24]

VI.

The Vietnamese ambassador to the United Nations was named in the indictment of Truong and Humphrey as an unindicted coconspirator. Subsequent to the publication of the indictment, the State Department designated the ambassador *persona non grata* and asked his government to recall him. The defendants advised the district court that they wished to speak with the ambassador and might call him as a witness. The government then agreed to a court order enjoining it for a period of ten days from taking action to expel the ambassador from the United States. Interpreting the order closely, the State Department, while it did not press its earlier request for recall,

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[24]The government urges that the conviction be upheld on the theory that the defendants stole government property in the form of Humphrey's work time and xeroxing facilities when Humphrey copied the documents during working hours at the United States Information Agency. The Third Circuit in *United States v. DiGilio*, 538 F.2d 972 (1976), *cert. denied sub nom. Lupo v. United States*, 429 U.S. 1038, 97 S.Ct. 733, 50 L.Ed.2d 749 (1977), recently upheld a conviction under § 641 based on this theory. In this case, however, the defendants were indicted based on the conversion of the information, not the theft of government xeroxing resources, and the judge's jury instructions likewise only dealt with conversion of information. Therefore, I think this rationale is unavailable to affirm the convictions and pass no judgment upon the validity of this method of proceeding under § 641.

also did not rescind it. Soon thereafter, the ambassador left the United States pursuant to his government's instructions. The defendants claim that they were thus denied compulsory process. *See Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

Some courts have dismissed indictments when the government has deported illegal aliens who were potential witnesses in the prosecution of a defendant. *See, e.g., United States v. Calzada*, 579 F.2d 1358 (7 Cir. 1978); *United States v. Mendez-Rodriguez*, 450 F.2d 1 (9 Cir. 1971). Those courts have ruled that the government violated the defendant's right to compulsory process by placing potential witnesses beyond his reach and beyond the jurisdiction of the court. But we do not think these authorities applicable.

There are two critical distinctions between the deportation cases and this diplomatic recall case. First, in the case of a diplomatic recall, the State Department's interest in holding foreign diplomats to acceptable standards of conduct is much more compelling than the government's interest in deporting illegal aliens. When a foreign diplomat becomes engaged in outrageous and perhaps sinister conduct, such as participation in an illegal conspiracy, the United States government cannot decline to act. Thus, while the government's interest in deporting illegal aliens may be outweighed by the defendant's right to compulsory process, the balance does not tip so clearly in the defendant's favor when the national government requests the recall of an errant representative of another nation.

Second, when a diplomat is the potential witness, he may well not testify even if he remains in the United States. Because of diplomatic immunity, the witness is not amenable to judicial process. The diplomat may

testify only if his government waives his immunity. Therefore, even if the United States government forces a foreign representative to leave, the government may not have prejudiced the defendant, because the foreign nation might have refused to permit its representative to testify in a United States criminal prosecution if he had stayed. As a consequence, the defendant's claim of a denial of compulsory process is very attenuated when a foreign diplomat is the unavailable witness.

Because of the bar of diplomatic immunity and because of the national interest in taking action against diplomats who misbehave, we conclude that, in order to demonstrate a denial of compulsory process, the defendant must go further than to point to a missing diplomat/witness and government involvement in the diplomat's recall. *Accord, United States v. Butenko,* 384 F.2d 554, 567 (3 Cir. 1967) *vacated and remanded on other grounds,* 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969).

We therefore hold that in a case such as this one a defendant must show prejudice by demonstrating that the foreign government would have waived the diplomatic immunity of its representative.[25] Without such a

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[25] Importantly, there is no evidence in this case that the government acted in bad faith. While the State Department did not make every effort to prevent the ambassador from leaving the United States, the government fully complied with the limited terms of the court order issued by the district judge. As the district court ruled, the order only instructed the government to refrain from taking further affirmative action to expel the ambassador from the United States. Thus, the order did not require the government to withdraw its recall request, nor did it require the government to take other steps to convince the ambassador to remain in the United States. By failing to rescind its recall request, then, the State Department did not act in bad faith.

Moreover, there is no proof that the State Department made the recall request merely to deny the defense a favorable witness.

showing, there is no reason to believe that the defendant was harmed by the potential witness' absence and there is likewise no reason to penalize the United States government for taking appropriate action against an errant diplomat. In this case, the defendants have failed to supply the necessary proof, and therefore there is no basis on which to conclude that the defendants were denied compulsory process.[26]

VII.

The defendants make a variety of other objections to their convictions. None of these do we find meritorious.

A. *Statements of a Coconspirator*

Krall testified that in April she delivered a package from Truong to Dong, president of the Vietnamese Association in Paris. Two persons arrived at Dong's headquarters; Dong told Krall that they were Vietnamese officials. Krall testified that the two unidentified officials told Dong, "I hope you get a package from America," and after Dong handed them the package, "What a perfect time for these government arrivals." The defendants object that these statements were inadmissible hearsay.

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[26]In addition, we note that the defendants have not argued that the government failed to cooperate with them in any efforts to secure the presence of the Vietnamese ambassador at trial. After the ambassador left the United States, the district judge extracted a pledge from the government that it would aid the defendants in an attempt to convince the Vietnamese government to allow the ambassador to appear at trial. Neither party has informed the court of the result of the defendants' entreaties to the Vietnamese government, if any were made, and we infer from this silence that the government did not violate its pledge.

These statements, however, were made by coconspirators and thus fall within the coconspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E). The defendants rely on *United States v. Stroupe,* 538 F.2d 1063 (4 Cir. 1976), in support of their claim that the evidence was inadmissible. But in *Stroupe,* the out-of-court statement was ruled inadmissible because the only real evidence of conspiracy was provided by the hearsay statement itself. Here, Krall's testimony, not merely the statements of the out-of-court declarant, provided evidence of the conspiracy. Therefore, under Fed. R. Evid. 801(d)(2)(E), the statements were admissible. *See United States v. Jones,* 542 F.2d 186, 203 (4 Cir.), *cert. denied,* 426 U.S. 922, 96 S. Ct. 2629, 49 L.Ed.2d 375 (1976).

B. *Admission of Truong's Library*

Several items removed from Truong's apartment were admitted in evidence at trial. Truong had contended that his interest in the cables obtained from Humphrey was a benign scholarly preoccupation with Vietnam and Vietnamese-American relations. Found among Truong's books and papers were a State Department Telecommunications Handbook which included classification codes, parts of the State Department Biographical Register which were annotated by hand to indicate which of the employees were "spooks," pictures of Truong in the company of the Vietnamese ambassador who was an unindicted coconspirator, and handwritten notes on espionage and counter-espionage. These materials were undoubtedly relevant to determining the nature of Truong's interest in the materials Humphrey gave him, an issue put before the court by Truong himself. The district judge decided that the probative value

of this evidence outweighed its possible prejudicial effect, Fed. R. Evid. 403, and we find no error in his determination.[27]

VIII.

We affirm the defendants' convictions, subject to further proceedings on remand. Upon remand, the district court will examine the final group of documents produced by the prosecution for Jencks Act material and take such steps as are consistent with this opinion.

AFFIRMED.

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[27]The defendants make several other challenges to their convictions which deserve only brief mention.

Humphrey petitioned the court to permit him to take a lie detector test and admit the results into evidence. Those circuits which have allowed the admission of the results of unstipulated lie detector tests have granted the district judge great discretion in deciding whether to admit the test results. *See, e.g., United States v. Mayes*, 512 F.2d 637, 648 n.6 (6 Cir.), *cert. denied*, 422 U.S. 1008, 95 S.Ct. 2629, 45 L.Ed.2d 670 (1975). We need not pass on the admissibility of such test results, because we find that even if they were admissible, the district judge did not abuse his discretion by excluding them in this case.

During his rebuttal, the prosecutor argued that disclosures of secret information could harm the national defense even if they "wouldn't put Russians on Pennsylvania Avenue." Although the comment may have been overblown, it was not so inflammatory as to require reversal, particularly in light of the equally rhetorical argument of the defense and in light of the fact that the Soviet Union did not play a role in this case. The prosecutor also made comments in his rebuttal that might be interpreted as shifting the burden of proof in some areas to the defense. The district judge interrupted the prosecutor's rebuttal and corrected any misimpressions through corrective instructions, and, in addition, the district judge's final instructions included the usual burden of proof directives.

Finally, we reject the defendants' contentions that the indictment was insufficient and that the voir dire was inadequate.

DONALD RUSSELL, Circuit Judge, concurring and dissenting:

I wholehearted concur in Judge Winter's scholarly opinion herein in which he has carefully and perceptively canvassed the troublesome law of criminal espionage, except for its ruling on the count charging a violation of § 641, 18 U.S.C., as set forth in Part V of the opinion.

In the district court the defendants were convicted under the espionage counts in the indictment and each received a sentence of fifteen years. They also were convicted under three other counts, including the count under § 641. They received sentences of five years under each of these counts. All sentences were to run concurrently. The opinion of Judge Winter sustains all these convictions save that under § 641. His opinion would reverse the conviction under this count. It was, however, the position of the Government, as stated in its brief, and reiterated in oral argument, that "if this Court affirms appellants' convictions on any of those counts (that is, the counts other than that under § 641), there is no occasion for it to consider appellants' contentions regarding their Section 641 convictions." In short, it declares that under the concurrent sentence rule, it is unnecessary in this case to review the conviction of the defendants under § 641. I agree.

The concurrent sentence rule provides that where a defendant receives concurrent sentences on plural counts of an indictment and where the conviction on one count is found to be good, a reviewing court need not pass on the validity of the defendant's conviction on another count. This familiar rule has been repeatedly approved by both the Supreme Court[1] and by this court.[2] In

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[1] *Barnes v. United States* (1973) 412 U.S. 837, 848, n.16, 93 S.Ct. 2357, 2364 n.16, 37 L.Ed.2d 380; *Lawn v. United States*

[2] [next page] [footnotes continued]

recent decisions—particularly because of the decision in *Benton v. Maryland* (1969) 395 U.S. 784, 791-92, 89 S.Ct. 2056, 2060-2061, 23 L.Ed.2d 707—the application of the rule has, though, been restricted to situations where there is no substantial possibility that the unreviewed conviction will adversely affect the defendant's right to parole or expose him to a substantial risk of adverse collateral consequences. *See United States v. Vasquez-Vasquez* (5th Cir. 1980) 609 F.2d 234, 235; *United States v. Rubin* (5th Cir. 1979) 591 F.2d 278, 280, *cert. denied,* 444 U.S. 864, 100 S. Ct. 133, 62 L.Ed.2d 87; *United States ex rel. Weems v. Follette* (2d Cir. 1969) 414 F.2d 417, 419, *cert. denied,* 397 U.S. 950, 90 S.Ct. 973, 25 L.Ed.2d 131 (1970). We recognized this limitation upon the rule in *Close v. United States* (4th Cir. 1971) 450 F.2d 152, 155, *cert. denied,* 405 U.S. 1068, 92 S.Ct. 1513, 31 L.Ed.2d 799 (1972).

There is, though, no substantial likelihood of adverse effect on defendants' possible parole rights or of other adverse collateral consequences arising out of the failure to review the convictions under § 641 in this case. *See United States v. Smith* (8th Cir. 1979) 601 F.2d 972, 974-75, *cert. denied,* 444 U.S. 879, 100 S. Ct. 166, 62 L.Ed.2d 108. The conviction under the espionage charges resulted in a sentence of fifteen years. Under

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(1958) 355 U.S. 339, 359, 78 S.Ct. 311, 322, 2 L.Ed.2d 321; *Roviaro v. United States* (1957) 353 U.S. 53, 59, n.6, 77 S.Ct. 623, 627 n.6, 1 L.Ed.2d 639; *Hirabayashi v. United States* (1943) 320 U.S. 81, 85, 63 S.Ct. 1375, 1378, 87 L.Ed. 1774.

[2] *United States v. Powell* (4th Cir. 1969) 407 F.2d 582, 585, *cert. denied,* 395 U.S. 966, 89 S.Ct. 2113, 23 L.Ed.2d 753; *United States v. Wechsler* (4th Cir. 1968) 392 F.2d 344, 348, *cert. denied,* 392 U.S. 932, 88 S.Ct. 2283, 20 L.Ed.2d 1389; *United States v. Jacobs* (4th Cir. 1967) 386 F.2d 170, 172.

§ 4205(a), 18 U.S.C., the defendants must serve at least five years under this sentence before they will become eligible for parole. The defendants, therefore, cannot be eligible for parole until they have service five years of their concurrent sentences. When, however, they have served that five years, they would have completed their concurrent sentences under the § 641 count. Neither is there any possible adverse effect on the defendants' place or conditions of confinement by reason of the application of the concurrent sentence rule in this case. *See United States v. Holder* (8th Cir. 1977) 560 F.2d 953, 956, n.4. Moreover, there could be no adverse effect under the Parole Commission's "salient factor score," since the guidelines for such "score" provide that multiple offenses arising out of a single set of circumstances (which is the situation here) will be treated as a single offense thereunder. *See United States v. Smith*, 601 F.2d at 975. Accordingly, allowing defendants' convictions under the § 641 count will not increase the time defendants will have to serve nor cause them any adverse collateral consequences. I, therefore, would apply the concurrent sentence doctrine in these cases, and decline to review the merits of the defendants' convictions under § 641. I find support for this view in the action taken by the court in *United States v. Boyce* (9th Cir. 1979) 594 F.2d 1246, 1252, also an espionage case, in which there was, as here, a concurrent sentence under a § 641 count which the court declined to review for the same reasons assigned by me for declining to review like convictions in these cases.

K. K. HALL, Circuit Judge, concurs in this opinion.

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Criminal No. 78-25-A

UNITED STATES OF AMERICA

v.

TRUONG DINH HUNG
AND
RONALD LOUIS HUMPHREY,
Defendants.

MEMORANDUM OPINION

The court has now received responses from the defendants and the United States to its October 1, 1980 Memorandum Opinion and Order.

While that Memorandum Opinion and Order directed the turning over of approximately thirty documents, there are only certain of these which the defendants, in their response, assert are significant. They are Remand Items 1, 2, 19, 34, 222, 234, 234A, 234B, 273, 318, 321, 331, 355, 436 and 483.

As a preliminary matter, to the extent that the documents are authored by the witness Hall, and this is true of Remand Items 19, 222, 234A, 234B, 273, 318, 321, 331 and 436, they cannot be considered as Jencks Act

statements *of Hall,* since he was not called as a witness for the government. 18 U.S.C. § 3500(b), *United States v. Disston,* 612 F.2d 1035, 1038 (7th Cir. 1980).

The court will consider the Remand Items in order. Some of them can be considered together.

Remand Items 1 and 2. These documents were not prepared by Hall or Ms. Krall. Nor do they in any way purport to be "signed or otherwise adopted or approved by [Ms. Krall]," 18 U.S.C. § 3500(e). Nor do they qualify as *Giglio* [*Giglio v. United States,* 405 U.S. 150 (1972)] or *Brady* [*Brady v. Maryland,* 373 U.S. 83 (1963)] material. To the extent that they contain evidence of the financial arrangement between the United States and Ms. Krall, they are fully consistent with the latter's testimony at trial and reveal no new information not brought out at trial. The reference to her as a resident agent is insignificant.

Remand Item 19. This piece of cable traffic is dated April 16, 1975. It was prepared by Hall. It relates to a conversation with Ms. Krall that took place well before she met Truong. It does not purport to be a verbatim conversation with her nor was it signed or otherwise adopted by her. The margin notations on it of "ploy" and "proved to be inaccurate" were not made by Hall, and do not, in view of their timing and when read together with the text of the cable itself and the parts thereof to which the notation refer, reflect in any significant degree on Krall's credibility.

Remand Item 34. The only significance of this item is the reference in it to Krall's plan to write a book. The cable itself was authored by Hall. It does not purport to be a verbatim statement of Krall or signed or otherwise adopted by her, except the quotation "Maybe CIA will

buy it." The subject of the book was known to defense counsel through the testimony of Hall. The quoted passage adds nothing to that knowledge.

Remand Item 222. This document is authored by Hall. It does not purport to be a verbatim statement of or signed or otherwise adopted by Krall. It is not a Jencks Act statement of Krall. Moreover, to the extent that it indicates an inconsistency between Dong's view of Ms. Branfman and Ms. Branfman's view of Dong as a friend or contradicts the tenor of Krall's account of her meeting with Dong, the inconsistency and contradiction are too insignificant to constitute *Brady* material.

Remand Items 234, 234A, and 234B. Item 234 is a dispatch, and 234A and 234B are contact reports prepared by Hall. The dispatch is dated September 24, 1976, and discusses two meetings with Hall and Krall, one on September 16 and one on September 20, 1976. Item 234A describes Hall's debriefing of Krall on September 18, 1976 in Paris. Item 234B is dated September 21, 1976 and also describes a debriefing of Krall. All were authored by Hall. The items contain some minor quotes, and both 234 and 234B contain the same substantially verbatim conversation between Krall and Hall; however, their significance, as pointed out in the Court of Appeals Opinion (slip op. p. 32), is not what is contained in the verbatim statement and the quotes, which are either not inconsistent with Krall's trial testimony or cover matters not touched on by Krall in her trial testimony, it is their omission to mention the statement made by Nam, as testified by Krall at trial, that "he [Truong] is one of our people in Washington." Further significance is argued by the defendants in the failure of the documents to mention David Truong.

The significance is weakened substantially, however, when the dates of the items were taken into account. In September of 1976 Krall's contacts with Truong were minimal. He was not the focus of the foreign intelligence inquiry (the one Hall, the CIA agent, and the person making these reports, was interested in) and did not become so until later in 1977. Moreover the court finds that the remarks concerning "one of our people in Washington" was contained in a report to FBI Agent Fleshman (the person who was interested in domestic involvement) in September, 1976. That report this court, during the trial on May 3, 1978, declined to order turned over to defense counsel. Had the absence of such a remark in the reports of Hall been brought out by the defense at trial, surely the government could and would have countered by showing, through Fleshman, that such a remark had, in September, 1976, been reported by Krall to him. Thus there is shown no prejudice to the defense by not having the Hall reports which omitted the remark. As to the exculpatory nature of the failure to mention David Truong, the court is satisfied that with all of the other evidence in this case the omission in these three documents, much of which is duplicated in 234 and 234B, would not have affected the outcome of the trial or created a reasonable doubt of the defendant's guilt that did not otherwise exist. *United States v. Agurs*, 427 U.S. 97, 104, 112 (1976).

Remand Item 273. This is a cable dated May 3, 1977. It was authored by Hall. It does not purport to be a verbatim statement of or signed or otherwise adopted by Krall. It is not a Jencks Act statement. Even if it arguably contains some exculpatory material, that same material was furnished the defense when they were given Fleshman's May 11, 1977 FBI 302. The inconsistency

between a drawer and a safe is inconsequential. If there was any confusion concerning which package was delivered to whom, as defense counsel now argues, there was ample opportunity and cause to pursue it at trial. Moreover the court disagrees that Item 273 indicates that only a package not containing the cables was given to Vietnamese government officials. Consequently it is not exculpatory evidence within the proscriptions of *Brady*.

Remand Item 318. This is an August 22, 1977 cable from Hall. It was not a verbatim statement of or signed or otherwise adopted by Krall. There was nothing in the cable that was subject of her testimony. It is not a Jencks Act statement. Nor is there anything in it or omitted from it that is exculpatory, and it is not inconsistent with Krall's testimony at trial.

Remand Item 321. This is a cable from Hall in Paris. It is not a verbatim statement or signed or otherwise adopted by Krall. It discusses matters not brought out in her direct testimony, but on cross-examination, and relates to her financial arrangements with the United States to send $10,000 to Krall's brother to enable him to get out of Vietnam, $3,000 of which was to be used to pay off creditors. While not a Jencks Act statement, it is arguably *Giglio* material. However, the payments of money to Krall by the United States were exhaustively explored by defense counsel at trial. How the money was to be spent or applied after it was paid seemed irrelevant to the court at trial, and still does. The fact that in excess of $10,000 ($11,800 was the figure used at trial) was spent to assist Krall's family was well known at trial by defense counsel.

Remand Item 331. This is a cable from Hall to CIA headquarters relative to Krall's commitment to testify. For the same reasons as Item 321 it is not a Jencks Act

statement. Also as in that item it contains arguably *Giglio* material, but, again, the subject of the cable was exhaustively covered on cross-examination by defense counsel. The fact that Krall imposed conditions, financial and otherwise, on testifying, was pointedly brought out during that examination. Moreover, of course, Krall did testify, even though her brother and father did not come out of Vietnam.

Remand Item 355. This is a cable from Hall dated September 3, 1977. As in the case of Items 321 and 331, it is not a Jencks Act statement. It relates, again, to the financial aid and conditions under which Krall agreed to testify. Arguably *Giglio* material, it nevertheless contains information known and thoroughly explored by defense counsel on cross-examination.

Remand Item 436. This is a December 5, 1977 cable from Hall and Fleshman. The only significance attached to it by defense counsel is its quote of a high-level Vietnamese (Dong) which referred to the material Krall was bringing to Paris as "just trash." It is neither a Jencks Act statement nor exculpatory. The cable does not reveal what material Dong was referring to, nor is it likely any witness who testified would have known what material he was referring to.

Remand Item 483. This is a cable from Hall and Fleshman transmitting the request of Krall's husband that money be provided Krall's sister. It was not a Jencks Act statement of Krall. Its significance, as asserted by defense counsel, is that it contains the statement that an "enormous amount" was spent on the case, and expressed the feeling of the case handlers that the Kralls were "using" the United States and would continue to do so. As pointed out before, the amounts paid and demanded by the Kralls were known and fully explored

at trial. As to "using" the United States, this is but more of the same argument, stressed vigorously at trial by defense counsel, that financial considerations influenced Krall's actions and trial testimony. That substantial amounts of money, well over and above her expenses, were paid Krall was never denied by the government at trial. She was admittedly a paid agent. This remand item would have been cumulative at best.

The court has considered all of the foregoing in combination as well as singly. Moreover it has borne in mind the admonition of the Court of Appeals that its application of the doctrine of harmless error to non-production of Jencks Act material should be strict (slip op. at p. 32). Nevertheless the court finds the omissions of any reference to David Truong and of mention of his being among "our people in Washington" in Remand Items 234, 234A and 234B, and the possible exculpatory nature of the information in Remand Item 273 to be the only items of substance of which defense counsel can complain of being deprived. The court has set out in its discussion of those items why it feels the failure to produce them was harmless error and not prejudicial. As to Item 273, it is not a Jencks Act statement. Consequently its significance is to be measured by *Brady* standards.[1] However, even accepting the arguments of defense counsel on these items in the light most favorable to the defendants, in light of all the evidence if heard in the case, the court is satisfied beyond a reasonable doubt that the production of the documents at trial would not have changed the

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[1]There is a suggestion in some of the cases that *Brady* does not apply merely to impeaching material. *United States v. Strahl*, 590 F.2d 10, 13 (5th Cir. 1978). Nevertheless the court has not applied any less strict standard as to exculpatory material.

verdicts in this case in the slightest. The evidence of guilt in the case on matters which did not depend upon those parts of Krall's testimony sought to be impeached was substantial to say the least. The cross-examination of Krall was as vigorous, competent and thorough as any the court has witnessed. Because she was a paid informant, the jury was cautioned that her testimony should be carefully weighed and tested before giving it unlimited credence and that it was not safe to accept it as conclusive unless it was corroborated by the testimony of other persons or by facts and circumstances clearly tending to support it.[2] The court therefore rejects the argument that the evidence omitted and included, respectively, in these two sets of documents in a trial which lasted over ten days could conceivably have added anything to the impeachment of Ms. Krall or the exculpation of the defendants. Certainly that evidence is insufficient to create a reasonable doubt that did not otherwise exist. The court is also sure in the conviction that any error was harmless and "did not influence the jury, or had but very slight effect." *Kotteakos v. United States,* 328 U.S. 750, 764 (1946), quoted in *United States v. Agurs, supra.*

Accordingly the motion for a new trial will be denied.

/s/ _____
United States District Judge

Alexandria, Virginia
December 2nd, 1980

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[2]The jury was, of course, also instructed that such testimony *was* competent evidence and would support a conviction even if uncorroborated if it convinced the jury of a defendant's guilt beyond a reasonable doubt.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Criminal No. 78-25-A

UNITED STATES OF AMERICA

v.

TRUONG DINH HUNG
AND
RONALD LOUIS HUMPHREY,
Defendants.

ORDER

For the reasons set forth in the Memorandum Opinion this day filed, it is hereby ORDERED that:

1. The motions of the defendants Truong Dinh Hung, a/k/a David Truong, and Ronald Louis Humphrey for a new trial are denied.

2. New judgments of conviction (see Court of Appeals slip op. at p. 33), identical to those entered on July 7, 1978, are entered as of this date, and the terms of the judgment and commitment orders of July 7, 1978, are incorporated in this order by reference. Copies thereof are attached to and made a part of this order.

/s/ _____
United States District Judge

Alexandria, Virginia
December 2nd, 1980

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-5176

UNITED STATES OF AMERICA,
Appellee,

v.

TRUONG DINH HUNG,
Appellant.

No. 78-5177

UNITED STATES OF AMERICA,
Appellee,

v.

RONALD LOUIS HUMPHREY,
Appellant.

NATIONAL ALLIANCE AGAINST RACIST & POLITICAL REPRESSION,
Amicus Curiae.

NATIONAL LAWYERS GUILD, CENTER FOR CONSTITUTIONAL RIGHTS, U.S. PEACE COUNCIL, WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM, FUND FOR OPEN INFORMATION AND ACCOUNTABILITY, INC.,
Amici Curiae.

No. 80-5230

UNITED STATES OF AMERICA,
Appellee,

v.

RONALD LOUIS HUMPHREY,
Appellant.

No. 80-5231

UNITED STATES OF AMERICA,
Appellee,

v.

TRUONG DINH HUNG,
Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA.
(*Albert V. Bryan, Jr., District Judge*)

Argued May 5, 1981 Decided July 14, 1981

Before WINTER, Chief Judge, RUSSELL and WIDENER, Circuit Judges.

Michael Tigar (John Mage, John J. Privitera; Marvin D. Miller on brief) for Appellant David Truong; (Warren L. Miller, Stein, Halpert & Miller; Mark W. Foster, Moore &

Foster; Roger E. Zuckerman, Zuckerman, Spaeder & Taylor on brief) for Appellant Ronald Lewis Humphrey; Justin W. Williams, United States Attorney (Sara Criscitelli, Jerome M. Feit, William G. Otis, Robert J. Erickson, Paul J. Brysh, Elliott Schulder, David R. Homer, Ann T. Wallace on brief) for Appellee United States; (O. Stephen Paganuzzi, Jr.; Marshall Perlin on brief) for Amici Curiae National Alliance Against Racist and Political Repression and Other Organizations.

PER CURIAM:

In a previous appeal we affirmed the judgments entered on defendants' convictions of espionage and related offenses but remanded the case to the district court for a determination of whether materials tardily produced by the government for inspection by the district court toward the end of the trial should have been produced for inspection by the defendants under the Jencks Act. 18 U.S.C. § 3500. We directed the district court to determine if the documents contained Jencks Act material, and, if so, whether their nonproduction was harmless error. We invested it with full authority to vacate the judgments and to grant a new trial if it found that Jencks Act material was withheld and the error was not harmless. *United States v. Truong Dinh Hung*, 629 F.2d 908 (4 Cir. 1980).

On remand the district court reviewed *in camera* the 540 documents submitted by the government. Of these, it extracted 30 which were arguably Jencks Act material and made them available to defense counsel under a protective order which prohibited counsel from divulging their contents to their clients or anyone else. After hearing argument from both sides, the district court ruled

that most of the documents were not Jencks material. It found that three may have contained Jencks material and one may have contained exculpatory material which should have been provided to the defendants under *Brady v. Maryland*, 373 U.S. 83 (1963). However, the district court further ruled that the failure to produce these materials was harmless error. Accordingly it entered new judgments of conviction against both defendants.

We see no infirmities in the district court's rulings, and we affirm.

We agree with the district court that the allegedly exculpatory material, producible under *Brady*, was essentially a duplication of evidence that was made available to defendants prior to trial. While we have serious doubts that the withheld data was exculpatory, the fact remains that even if produced it would have told defendants nothing that they did not already know. As a consequence, any error in the failure to produce it was harmless.

We also agree with the district court that the non-production of the purported Jencks Act material was harmless error even if it is held to have been producible under the Act. The material consists of records made by a government agent of oral reports from Dung Krall, a CIA informant. According to defendants, the material is significant because it contains no mention of Truong whereas Krall's testimony at trial regarding the subject matter of the reports included a statement suggesting that Truong was a foreign agent.* We find little merit in

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*At least arguably, the conversation contained in the reports is not the one about which Krall testified at trial. Krall's testimony is ambiguous on this point.

defendants' contention. First, it does not appear that in making her oral reports Krall was asked any questions which would have generated any mention of Truong. The omission in the report would thus be a very weak ground for impeachment. This is especially true since neither Krall nor the officer to whom she reported had focused attention on Truong at the time the reports were made. Second, the government showed that in another report to a government investigating officer made soon after that sought to be produced, the witness did mention this defendant. Thus to the extent that the witness might have been impeached by the omission, she could have been rehabilitated by the other report. The witness was subjected to impeachment on numerous other grounds and the benefit to defendants of the additional impeachment, if any, is to our mind so slight that the judgments should not be disturbed.

Like the district court, we also believe that materials which defendants claim should have been produced under *Giglio v. United States*, 405 U.S. 150 (1972), provided evidence which was merely cumulative. At trial defense counsel exhaustively explored the fact that Krall was a paid government informant, that she had received a variety of benefits from the government for both herself and her family, and that she debated with her government employers about salary increases. Moreover, one of the officers to whom she reported testified that the officer who employed her told her that "her production and performance would be reviewed from time to time, and her salary would be adjusted accordingly . . . [H]e also mentioned that there could be bonuses." Thus the jury was fully apprised that the amount of her compensation depended upon her ability to supply useful information. The materials at issue would have added

nothing new to defendants' already substantial basis to argue that she was not a credible witness.

Finally, we are constrained to comment on the district court's protective order which prohibited counsel, when they were permitted to inspect documents to assist the district court in determining if they were Jencks Act materials, from disclosing their contents to their clients. Defendants contend that this restriction denied them their Sixth Amendment right to counsel and their Fifth Amendment right to a fair trial. We disagree. A court is authorized under the Jencks Act to determine *ex parte* whether items are properly required to be disclosed. 18 U.S.C. § 3500(c). The court therefore was not required to disclose these materials even to defense counsel unless it determined that the documents were discoverable under the Act. Thus, where the district court decides to make this determination as a result of an adversary process, it may validly prohibit counsel from communicating the contents of what is seen to their clients unless and until the district court rules that the materials must be produced.

Of course, in the usual case when production is ordered, a client has the right to see and know what has been produced. *See, e.g., Geders v. United States,* 425 U.S. 80 (1976); *Faretta v. California,* 422 U.S. 806 (1975). This case, however, was not the usual case. Here, in the case of defendants convicted under the espionage statutes, we ordered further proceedings after the trial was concluded to determine if error invalidating their convictions was made. The district court correctly concluded from the face of the record that prejudicial error did not occur, and it did so for reasons where the comments of defendants and their further testimony could not have been of any aid in reaching a decision.

The lack of knowledge on the part of defendants and the absence of their participation, if error, was harmless.

AFFIRMED.

APPENDIX E

SECTION 2

"Conduct of" ~~Restrictions on~~ Intelligence Activities

2-1. ~~*Adherence to Law.*~~ *"General."*

2-101. *Purpose.* Information about the capabilities, intentions and activities of foreign powers, organizations, or persons and their agents is essential to informed decision-making in the areas of national defense and foreign relations. The measures employed to acquire such information should be responsive to legitimate governmental needs and must be conducted in a manner that ~~preserves and~~ respects established concepts of privacy and civil liberties.

2-102. *Principles of Interpretation.* Sections 2-201 through 2-309 set forth ~~limitations~~ *"governing principles"* which in addition to other applicable laws, are intended to achieve the proper balance between protection of individual ~~rights~~ *"interests"* and acquisition of essential information. [~~Those sections do not authorize any activity not authorized by sections 1-101 through 1-1503 and do not provide any exemption from any other law.~~] For [ ] material, substitute the following:

> *"Those sections govern the conduct of specific activities which are authorized for the performance of the functions and responsibilities assigned to the agencies within the Intelligence Community. Those sections shall not be construed as affecting or restricting other lawful activities of intelligence components not otherwise addressed therein. Nothing in this Order shall affect the law enforcement responsibilities of any department or agency.*

Any collection activity conducted for a law enforcement purpose may be handled in accordance with relevant law enforcement procedures, as appropriate."

2-201. *General Provisions.*

(a) The activities described in Sections 2-202 through 2-208 shall be undertaken [~~only as permitted by this Order and by procedures established by the head of the agency concerned and approved by the Attorney General. Those procedures shall protect constitutional rights and privacy, ensure that information is gathered by the least intrusive means possible, and limit use of such information to lawful governmental purposes.~~] For [ ] material, substitute the following:

"*in accordance with this Order and procedures established by the head of the agency concerned and determined by the Attorney General not to violate the constitution or statutes of the United States. Those procedures shall protect constitutional rights, limit use of such information to lawful governmental purposes and, to the extent consistent with the intelligence needs of the United States, accommodate privacy. No agency head shall establish any procedure which the Attorney General determines to be unlawful under the Constitution or statutes of the United States.*"

(b) [~~Activities described in sections 2-202 through 2-205 for which a warrant would be required if undertaken for law enforcement rather than intelligence purposes shall not be undertaken against a United States person without a judicial warrant, unless the President has authorized the type of activity involved and the Attorney General has both approved the particular~~

~~activity and determined that there is probable cause to believe that the United States person is an agent of a foreign power.~~] For [ ] material, substitute the following:

> "*The Attorney General hereby is delegated the power to approve the use, for intelligence purposes, of any technique for which a warrant would be required if undertaken for law enforcement purposes, provided that such activities shall not be undertaken in the United States or against a United States person abroad without a judicial warrant, unless the Attorney General had determined that under the circumstances the activity is lawful under the Constitution and statutes of the United States. The Attorney General may approve the use of such techniques by category or delegate authority to the head of any agency within the Intelligence Community to approve the use of such techniques in accordance with procedures approved by the Attorney General.*"

Opposition

Office-Supreme Court, U.S.
FILED
DEC - 9 1981
ALEXANDER L. STEVAS,
CLERK

Nos. 81-631 and 81-5344

In the Supreme Court of the United States

OCTOBER TERM, 1981

TRUONG DINH HUNG, PETITIONER

v.

UNITED STATES OF AMERICA

RONALD LOUIS HUMPHREY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' Fourth Amendment rights were violated when they were overheard in the course of warrantless electronic surveillance undertaken to gather foreign intelligence and authorized by the Attorney General and the President (both petitions).

2. Whether petitioner Truong's Fourth Amendment rights were violated when an undercover agent, whom petitioner believed to be a courier for a foreign government, permitted FBI officials to inspect papers petitioner had given her to take overseas (No. 81-631).

3. Whether the trial court properly instructed the jury on the issues of national defense, national security, and document classification as they related to the espionage offenses with which petitioners were charged (No. 81-631).

4. Whether the unauthorized transmittal of information copied from government documents constitutes a "conversion" punishable under 18 U.S.C. 641 and, if so, whether that statute is unconstitutionally vague and overbroad (No. 81-631).

5. Whether the government withheld exculpatory evidence from petitioners (No. 81-631).

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-631

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v.

UNITED STATES OF AMERICA

No. 81-5344

RONALD LOUIS HUMPHREY, PETITIONER

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UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. 28a-79a)[1] is reported at 629 F.2d 908. The opinion of the court of appeals after remand (Pet. App. 89a-95a)

[1] "Pet. App." refers to the appendix to the petition in No. 81-631.

is not yet reported. The opinion of the district court on remand (Pet. App. 80a-87a) is not reported. The earlier opinion of the district court (Pet. App. 1a-27a) is reported at 456 F. Supp. 51.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 1981. In No. 81-5344, the petition for a writ of certiorari was filed on September 3, 1981. In No. 81-631, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including September 29, 1981, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioners were convicted of espionage and conspiracy to commit espionage, in violation of 18 U.S.C. 794(a) and (c) (counts 1 and 3), conspiracy to convert and conversion of classified government documents exceeding $100 in value, in violation of 18 U.S.C. 371 and 641 (counts 2 and 5), acting as unregistered agents of a foreign government, in violation of 18 U.S.C. 951 and 2 (count 6), and delivery of material related to the national defense to unauthorized persons, in violation of 18 U.S.C. 793(e) and 2 (count 7). Petitioners were sentenced to concurrent terms of 15 years' imprisonment on the espionage charges and to lesser concurrent terms on the other counts.[2] The court of appeals affirmed (Pet. App. 28a-79a, 89a-95a).

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[2] Petitioners were sentenced to concurrent terms of two years' imprisonment on count 2 and five years' imprisonment on counts 5, 6 and 7. They were acquitted on count 4, charging concealment of government documents with intent to convert (18 U.S.C. 641) under the district court's charge that they could be convicted either for concealment or conversion, but not both.

The evidence showed that petitioners furnished classified national security information to representatives of the Socialist Republic of Vietnam (Vietnam) at the time of the 1977 Paris negotiations between that country and the United States. Petitioner Humphrey was an employee of the United States Information Agency (USIA) with top secret clearance. His role in the scheme was to copy classified documents kept at that agency, remove the classification markings, and give the copies to petitioner Truong. In turn, petitioner Truong, a Vietnamese native who had volunteered to obtain classified documents for the Vietnamese government, sent packages of these classified papers to Vietnamese officials via a courier, Dung Krall. Unbeknownst to petitioners, Krall, a confidential informant employed by the government, alerted the United States to petitioner Truong's dealings with her and provided federal officers the opportunity to copy the documents before she turned them over to Vietnamese agents.

1. The government first learned that petitioner Truong had access to classified documents in late April 1977, when Krall delivered to an FBI agent a package of papers petitioner had given her to take to Paris. On May 5 and 6, 1977, the Attorney General was advised of this development and of the contents of the intercepted package.[3] He believed that the circumstances made it "imperative * * * to determine the extent of the material already compromised, the source of the materials within the Government, the identity and scope of [petitioner Truong's] intelligence network, and the extent of this network's activities" (C.A. App. 121). Accordingly, on

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[3] The contents included 61 State Department cables, most of them classified "secret" or "confidential," which analyzed aspects of the military and economic conditions in Vietnam and other Southeast Asian countries (C.A. App. 1038-1187, 1811-1820). One of the cables provided information on American servicemen who might still have been alive in Vietnam. Another described oil pipelines and underground facilities in Laos that could be used to support recently arrived Vietnamese regiments.

May 9, 1977, acting pursuant to authority delegated to him by the President,[4] the Attorney General authorized a 90-day wiretap on the telephone at Truong's residence (C.A. App. 120-121, 398-401).[5] The tap began on May 11, 1977.

In late May 1977, the FBI advised the Attorney General that it had intercepted a telephone call made to Truong's residence in which an individual named "Ron" arranged to meet with Truong, and that later that same day petitioner Humphrey had been observed entering Truong's apartment building with a briefcase. Humphrey was later identified as a USIA watch officer with access to many of the documents petitioner had given to Krall. Concerned that Humphrey was passing classified information to petitioner in the apartment and anticipating "that their discussions would reveal the identities of persons who might be furnishing Truong with classified information or assisting him in conducting his intelligence gathering," the Attorney General authorized microphone surveillance within Truong's apartment until August 26, 1977 (C.A. App. 122-123).[6]

The electronic surveillance on Truong's telephone was continued for two successive 90-day periods by authorizations of the Attorney General on August 5, 1977 and November 1, 1977. The microphone surveillance was likewise extended for successive 90-day periods, pursuant to authorizations by the Attorney General, on August 18, 1977, and November 22, 1977. All electronic surveillance

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[4] On February 3, 1977, the President had authorized the Attorney General to approve warrantless electronic surveillance within the United States for certain specified purposes. These included the procurement of foreign intelligence information essential to national security and the protection of national security information against foreign intelligence activities.

[5] "C.A. App." refers to the appendix in the court of appeals.

[6] On June 15, 1977, pursuant to a request from Attorney General Bell, President Carter authorized, for a period of 90 days, closed circuit television surveillance of Humphrey's office while he was on duty. No evidence stemmed either directly or indirectly from this surveillance.

of petitioner Truong terminated on January 31, 1978, when both petitioners were arrested. During the period of surveillance, FBI agents monitored and recorded all of Truong's telephone calls over a period of 268 days, with the exception of one call between petitioner and an attorney (C.A. App. 479). The microphone was activated only when it was believed that someone was in the apartment with petitioner. Purely social conversations were not monitored (C.A. App. 488-489).

2. Prior to trial, petitioners moved to suppress evidence derived from the electronic surveillance conducted from April 1977 through January 1978. The district court granted the motions in part and denied them in part (Pet. App. 1a-27a). The court ruled that warrantless electronic surveillance may properly be conducted on foreign agents and collaborators when authorized by either the President or the Attorney General (acting pursuant to Presidential delegation), if the "primary" purpose of the surveillance is the gathering of foreign intelligence information (*id.* at 4a-11a). The court found that the electronic surveillance in this case was, from its inception and through July 19, 1977, conducted "for the primary, or even sole, purpose of foreign intelligence gathering" (*id.* at 11a). In addition, the court held that the surveillance conducted prior to July 20, 1977, was justified, both in its duration and its scope, by the nature of the case (*id.* at 15a-16a).

The district court determined, however, that by July 20, 1977, the primary focus of the investigation had shifted from counter-intelligence gathering to the procurement of evidence for a criminal prosecution (Pet. App. 13a-14a). At that time, according to the court, the Department of Justice was attempting "to put together a criminal case" (*id.* at 14a). Accordingly, the court held that the fruits of the electronic surveillance and of several package searches conducted on or after July 20 had to be suppressed because these intrusions were not authorized pursuant to a warrant.

The court of appeals agreed with the district court that the President is constitutionally empowered to initiate warrantless electronic surveillance of foreign agents in order to gather national security intelligence (Pet. App. 33a-42a). The court stressed, however, that the foreign intelligence exception to the warrant requirement is limited to surveillance of "a foreign power, its agent or collaborators" (*id.* at 39a). In addition, the court of appeals endorsed (*id.* at 40a) the district court's view that

> the executive should be excused from securing a warrant only when the surveillance is conducted "primarily" for foreign intelligence reasons. We think that the district court adopted the proper test, because once surveillance becomes primarily a criminal investigation, the courts are entirely competent to make the usual probable cause determination, and because, importantly, individual privacy interests come to the fore and government foreign policy concerns recede when the government is primarily attempting to form the basis for a criminal prosecution.

ARGUMENT

1. Petitioners contend (81-631 Pet. 5-13, 15-16; 81-5344 Pet. 5-7) that their Fourth Amendment rights were violated by the warrantless electronic surveillance conducted prior to July 20, 1977, and that the courts below erred in refusing to suppress the fruits of that surveillance. This contention does not merit further review for a variety of reasons.

a. To begin with, the warrantless surveillance prior to July 20, 1977, did not violate petitioners' constitutional rights.[7] Although this Court has not decided whether the

[7] Petitioners do not claim that the Attorney General lacked adequate grounds for believing that their activities represented a threat to national security or that it was unreasonable (apart from the failure to secure a warrant) to initiate electronic surveillance of Truong's telephone and apartment in an effort to identify the scope of the espionage activities that were underway and the existence of other conspirators, if any.

President may, without prior judicial approval, authorize electronic surveillance to gather foreign intelligence in the service of national security (see *United States* v. *United States District Court*, 407 U.S. 297, 308-309, 321-322 (1972)), every appellate court that has confronted the question directly has concluded that the Constitution permits the President to exercise this authority. See *United States* v. *Butenko*, 494 F.2d 593, 605 (3d Cir.) (en banc), cert. denied, 419 U.S. 881 (1974); *United States* v. *Brown*, 484 F.2d 418, 426 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974); *United States* v. *Buck*, 548 F.2d 871, 875 (9th Cir.), cert. denied, 434 U.S. 890 (1977); see also *United States* v. *Ajlouny*, 629 F.2d 830, 839-840 (2d Cir. 1980), cert. denied, 449 U.S. 1111 (1981); but see *Zweibon* v. *Mitchell*, 516 F.2d 594, 651 (D.C. Cir. 1975) (en banc; plurality opinion), cert. denied, 425 U.S. 944 (1976) (dictum).[8] This Court recently declined to review the identical issue in *United States* v. *Ajlouny*, *supra*, and there is no reason for a different result here.

As the court of appeals observed (Pet. App. 35a-37a), there are several compelling considerations that militate against imposition of a uniform warrant requirement for foreign intelligence surveillances:

> First of all, attempts to counter foreign threats to the national security require the utmost stealth, speed, and secrecy. A warrant requirement would add a procedural hurdle that would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay executive response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operations. * * *

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[8] *Zweibon*, unlike the present case, involved electronic surveillance of members of a domestic organization whose actions had an effect on foreign relations, but who acted neither as agents of nor collaborators with a foreign power. 516 F.2d at 651. Thus, the result in *Zweibon* is not inconsistent with the holding of the court of appeals in this case.

> More importantly, the executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance. * * *
>
> Perhaps most crucially, the executive branch not only has superior expertise in the area of foreign intelligence, it is also constitutionally designated as the pre-eminent authority in foreign affairs. * * *
>
> In sum, because of the need of the executive branch for flexibility, its practical experience, and its constitutional competence, the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance. * * *

After a two-day evidentiary hearing on the electronic surveillance issue, the district court concluded that prior to July 20, 1977, petitioners' conversations were intercepted in the course of foreign intelligence surveillance primarily designed to safeguard the national security (Pet. App. 11a-14a). The court of appeals, after a review of the same materials, agreed with the district court's assessment (*id.* at 39a-42a). Thus, the surveillance did not violate the Fourth Amendment because it was conducted without prior judicial authorization.

b. Petitioners contend (81-631 Pet. 8, 10; 81-5344 Pet. 8-11), however, that the courts below defined the foreign intelligence exception to the warrant requirement too broadly. They argue that this exception should be allowed, if at all, only where the surveillance is undertaken "solely for the purpose of gathering foreign intelligence information" (81-631 Pet. 10, quoting *United States* v. *Butenko*, *supra*, 494 F.2d at 605). They suggest that the court of appeals' ruling (Pet. App. 40a-41a) that the foreign intelligence exception should be recognized when the "primary purpose" of the surveillance is the gathering of foreign intelligence lends itself to abuse.

But whatever the prospects for abuse might be in a hypothetical case, there plainly was no abuse here. By the time electronic surveillance was initially authorized on May 9, 1977, Department of Justice officials were aware that petitioner Truong was passing secret government documents to agents of Vietnam and that he therefore might be subject to criminal prosecution (C.A. App. 544-545). At the same time, however, the officials recognized that prosecution in such cases is "infrequent," and they did not know whether a prosecution in this case was a realistic possibility "since any prosecution would require public disclosure of classified information, disclosure of the [courier Krall] and would preclude the option of conducting an ongoing counterintelligence operation against this network over an extended period" (C.A. App. 121-122).

Beginning in May 1977 and during June and part of July, officials in the Criminal Division were briefed on the case by the FBI from time to time; however, they gave no advice as to the manner in which the investigation should be conducted and came to no conclusions as to whether a prosecution should be brought (C.A. App. 300-308, 312, 320, 329-328). In June 1977, the Attorney General inquired as to the prospects for a prosecution. A status memorandum from the Criminal Division dated July 19, 1977, concluded for the first time that probable cause existed to charge petitioners with various offenses, but cautioned that both the testimony of Krall, to whom a commitment of confidentiality had been made, and the introduction into evidence of classified State Department communications transmitted from Truong to the Vietnamese in Paris, would be essential to a successful prosecution (C.A. App. 313-315, 363-364).[9]

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[9] State Department approval of the use of the classified documents at trial was not obtained until mid-December 1977, and Krall did not agree to testify until January 1978 (C.A. App. 124-125, 568).

As these facts strongly suggest, to propose that the President's foreign intelligence power be limited to cases in which there is absolutely no prospect of criminal prosecution is to propose that it be eliminated altogether. As the court of appeals recognized in rejecting petitioners' argument (Pet. App. 40a-41a (footnote omitted)):

> [A]lmost all foreign intelligence investigations are in part criminal investigations. Although espionage prosecutions are rare, there is always the possibility that the targets of the investigation will be prosecuted for criminal violations. Thus, if [petitioners'] "solely" test were adopted, the executive would be required to obtain a warrant almost every time it undertakes foreign intelligence surveillance, and, as indicated above, such a requirement would fail to give adequate consideration to the needs and responsibilities of the executive in the foreign intelligence area.

c. In any event, as the Second Circuit explained in *United States* v. *Ajlouny*, *supra*, 629 F.2d at 840-842, it would be inappropriate to apply the exclusionary rule in a case such as this one, even assuming that petitioners' rights had been violated by the surveillance. The primary, if not the exclusive, justification for the exclusionary rule is the deterrence of illegal police conduct. *Stone* v. *Powell*, 428 U.S. 465, 485-486 (1976).[10] But the national security surveillance here was not undertaken in the service of any purpose ordinarily identified with the police or with criminal law enforcement generally; accordingly, suppression would not have been an effective deterrent. Moreover, unlike the typical case in which an excessive official intrusion results from misjudgment or

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[10] Although the exclusionary rule has also been described as protecting the integrity of the judicial process from the taint of illegally seized evidence, the Court's decisions demonstrate that this justification plays only a limited role in determining whether to apply the exclusionary rule in a particular context. *E.g.*, *Stone* v. *Powell*, *supra*, 428 U.S. at 485.

overzealousness of an officer in the field (see, *e.g.*, *Delaware* v. *Prouse*, 440 U.S. 648, 661 (1979)), the intrusion in this case was authorized by the Attorney General pursuant to the power delegated to him by the President. The President possesses this power as an aspect of his authority over the nation's foreign affairs; the foreign affairs authority necessarily includes protecting the nation against hostile acts of a foreign power and obtaining counterintelligence information deemed essential to the security of the United States. See *United States* v. *Ajlouny*, *supra*, 629 F.2d at 838. It is unlikely that officials conducting surveillance to gather information of this character, and acting essentially at the direction of the President, will be—or ought to be—deterred in their operations by the prospect that incidental discoveries will not be usable at a criminal trial. Thus, even if petitioners' rights were violated by the surveillance, nothing in the Fourth Amendment or the exclusionary rule requires suppression of the fruits of that surveillance. See *United States* v. *Ajlouny*, *supra*, 629 F.2d at 840-841.[11]

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[11] In addition, even assuming that the exclusionary rule's deterrent purpose is relevant here, "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *United States* v. *Peltier*, 422 U.S. 531, 542 (1975). Because the prevailing view of the federal courts at the time of the interceptions was, and continues to be, that no warrant was required to conduct foreign intelligence surveillance (see cases cited at page 7, *supra*), the agents could reasonably have believed that their conduct was lawful.

The warrantless electronic surveillance, which took place in the District of Columbia, was not in violation of established D.C. Circuit law. In *Zweibon* v. *Mitchell*, *supra*, 516 F.2d at 651, a plurality of that court expressly declined to hold that a warrant was required for electronic surveillance conducted for foreign intelligence purposes. The other judges on the court also found it unnecessary to reach that issue. *Id.* at 686 (McGowan, J., concurring); *id.* at 688-689 (Robb, J., concurring); *id.* at 689 (opinion of Wilkey, J.); *id.* at 706 (opinion of MacKinnon, J.). Thus, the

d. Finally, and perhaps most importantly, the question presented here does not merit review because it is of limited practical significance in light of Congress' enactment of the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. (Supp. III) 1801-1811. This Act, which was adopted with the support of the Executive Branch (see H.R. Rep. No. 95-1283, 95th Cong., 2d Sess. 13-14 (1979)), requires prior judicial authorization for foreign intelligence electronic surveillance, while simultaneously protecting the President's need to act swiftly and secretly.[12] The warrant requirement imposed by the Act will, presumably, reduce or eliminate altogether future instances of warrantless national security electronic sur-

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issue was and is an unsettled one, even in the D.C. Circuit. The costs to society far outweigh whatever minimal deterrent benefits may flow from suppression of probative evidence because of the agents' failure to conform their conduct to dicta in a court of appeals' plurality opinion.

[12] Sections 102(a)(3) and 103(c) of the Act safeguard the overriding needs for secrecy by providing that the warrant applications shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of Central Intelligence. Disclosure of applications is strictly limited by Section 106(f). In addition, the President is assured that his application for a warrant or an appeal from its denial will not encumber his authority to gather necessary intelligence information with dispatch. Section 105(e) permits the use of electronic surveillance without a warrant for up to 24 hours in emergencies, and Section 103 requires the courts to expedite their review of warrant applications. The Act allows an initial surveillance of up to 90 days (and of up to one year where the target is a foreign power), with extensions for one year (Section 105(d)(2)). Only seven judges, appointed by the Chief Justice, are empowered to pass on government applications, and review of their decision is confined to a specially-designated panel of three judges and to this Court on an expedited certiorari procedure (Section 103). The Act does not require that an application for a warrant make out probable cause in the traditional sense; rather, it confides to the exclusive discretion of the President and designated officials in the Executive Branch the decision that the information sought is foreign intelligence information and that the electronic surveillance is needed (Section 105).

veillance within the United States. Accordingly, there is no occasion for the Court to decide now whether the Constitution independently imposes a warrant requirement for surveillance of this character. Henceforth, government agents' conduct of foreign intelligence surveillance will normally be guided and measured by the standards the Act establishes—standards that petitioner Humphrey acknowledges (81-5344 Pet. 8-9 n.7) exceed the constitutional requirements specified by the court of appeals. If, as petitioner Truong suggests (81-631 Pet. 9), the new statutory requirements will not be followed, "there will be time enough to deal with" that problem when it arises. See *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 566 (1978).

2. There is no merit to petitioner Truong's claim (Pet. 14) that his Fourth Amendment rights were violated by the warrantless search of the packages of papers that he gave to Krall in April 1977. Petitioner gave Krall two installments of the April shipment of papers to Paris. On April 19, 1977, he gave her a cardboard box containing other boxes, and a large envelope containing papers and several smaller envelopes (C.A. App. 563, 1635). Two days later he gave her the package containing the cables. This package consisted of a plastic bookstore bag loosely wrapped with twine and stuffed inside a large unsealed manila envelope (5/2/78 Tr. 240). Petitioner cautioned Krall to take "good care" of the materials he had given her, but he did not advise her to transport them in a particular manner, nor did he instruct her to leave them arranged in the way she had received them (C.A. App. 570). Petitioner knew that Krall was going to carry the package on an international journey, in the course of which her possessions would be subject to customs searches. See *United States* v. *Ramsey*, 431 U.S. 606, 616 (1977). Yet he gave no express instructions as to the manner in which the packages or their contents were to be carried. Moreover, petitioner transferred to Krall full custody and control of the packages, which he did not expect to see again.

In light of these facts, petitioner assumed the risk that Krall would reveal the documents to others. As the court observed in *United States* v. *Carter*, 569 F.2d 801, 803 (4th Cir. 1977), cert. denied, 435 U.S. 973 (1978), "[s]earches undertaken with the consent of one with dominion over the property are a well recognized exception to the warrant requirements of the Fourth Amendment." Consent for a search need not be obtained from the owner of the property, but may come from one "who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States* v. *Matlock*, 415 U.S. 164, 171 (1974). Authority to consent to a search is not governed by the law of property or "metaphysical subtleties" (*Frazier* v. *Cupp*, 394 U.S. 731, 740 (1969)), "but rests rather on mutual use of the property by persons generally having joint access or control for most purposes." *United States* v. *Matlock*, *supra*, 415 U.S. at 171 n.7. Thus, any person having joint access to chattels "has the right to permit the inspection in his own right and * * * others have assumed the risk that one of their number might permit the common area to be searched." *Ibid.* Krall's consent to the April package search thus presents no novel issue, and the court of appeals' approval of that search is consistent with the decisions of other courts holding that a custodian intermediary may consent to a search of items placed in his care. See, *e.g.*, *United States* v. *Walker*, 575 F.2d 209, 212 (9th Cir.), cert. denied, 439 U.S. 931 (1978) (search of envelope containing photographs with consent of custodian); *United States* v. *Gulma*, 563 F.2d 386, 389-390 (9th Cir. 1977) (search of motel room with consent of one to whom the key had been given for delivery to another); *United States* v. *Gradowski*, 502 F.2d 563 (2d Cir. 1974) (search of car with consent of those with whom the car and keys had been left); *Marshall* v. *United States*, 352 F.2d 1013 (9th Cir. 1965), cert. denied, 382 U.S. 1010 (1966) (search of briefcase with consent of one with whom the defendant had left the briefcase for safe-

keeping); *Rees* v. *Peyton*, 341 F.2d 859 (4th Cir. 1965) (search of accordian case with consent of occupants of house in which the case had been left).[13]

3. Petitioner Truong contends (Pet. 16-20) that the district court erred in its instructions concerning the espionage counts because it did not charge that "national defense" involves only military matters, and because it permitted the jury to consider the fact that some of the copied documents were classified but not whether their classification was proper.

The court instructed the jury in relevant part (C.A. App. 2781-2782):

> The term "national defense" about which you have heard some testimony is a general concept of broad connotations, and refers to the military and naval establishments and related activities of national preparedness. The relationship must not be a strained one or an arbitrary one.
>
> The information, in order to be of the type meant in the statute, must be related in a direct and reasonable way to the national defense. It is not necessary that the document or cable or airgram show on its face that it is related to national defense.
>
> The document, however, must contain information or sources or both which, taken alone or in combination with other information, are related in a direct and reasonable way to the national defense.
>
> Whether or not the information and documents allegedly sought to be obtained and transmitted by the defendant and his alleged co-conspirators concerned or was connected with the national defense is

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[13] Petitioner's reliance on *United States* v. *Ross*, 655 F.2d 1159 (D.C. Cir. 1981) (en banc), cert. granted, No. 80-2209 (Oct. 13, 1981), is entirely misplaced. *Ross* involves the question whether a warrant is required to conduct a nonconsensual search of a paper bag seized from an automobile. In this case, however, the constitutionality of the search turns on Krall's consent, the validity of which petitioner does not challenge.

> a question of fact solely to be decided by you, the jury, taking into consideration all of the circumstances of the alleged crime, the alleged source, origin, character, and utility of the information and documents.
>
> You may also consider the testimony that the documents were classified.

The district court's definition of "national defense" repeated verbatim this Court's definition of that term in *Gorin* v. *United States*, 312 U.S. 19, 28 (1941). See also *New York Times Co.* v. *United States*, 403 U.S. 713, 739-740 (1971) (White, J., concurring); *United States* v. *Dedeyan*, 584 F.2d 36, 39 (4th Cir. 1978). Since petitioner does not argue that the *Gorin* definition should be overruled, his challenge to the court's instruction is without force.[14]

Similarly, the district court properly allowed the jury to consider the fact that the information was classified.

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[14] Petitioner Truong is incorrect in stating (Pet. 18) that the district court improperly embellished the definition of national defense by referring to "sources." This reference did not either expand or limit the definition taken from *Gorin*; it simply explained that the revelation of sources could relate to the "national defense."

The government's chief witness on the significance of the copied documents testified that they provided information identifying covert sources. Thus enlightened, the Vietnamese could limit or manipulate future information and possibly seek reprisal against previous contacts. In this sense, the cables involved here implicated the national defense in a way similar to the naval intelligence reports in *Gorin*, of which this Court said (312 U.S. at 29):

> A foreign government in possession of this information would be in a position to use it either for itself, in following the movements of the agents reported upon, or as a check upon this country's efficiency in ferreting out foreign espionage. It could use the reports to advise the state of the persons involved of the surveillance exercised by the United States over the movements of these foreign citizens. The reports, in short, are a part of this nation's plan for armed defense. The part relating to espionage and counter-espionage cannot be viewed as separated from the whole.

The espionage statutes are aimed at protecting "guarded information" (*Gorin* v. *United States*, *supra*, 312 U.S. at 30), and the fact that information is classified, whether properly or not, is obviously one factor in determining whether it is "guarded." Compare *United States* v. *Soblen*, 301 F.2d 236, 239 (2d Cir.), cert. denied, 370 U.S. 944 (1962), with *United States* v. *Heine*, 151 F.2d 813 (2d Cir. 1945), cert. denied, 328 U.S. 833 (1946). See also *United States* v. *Dedeyan*, *supra*, 584 F.2d at 40, where the court found no error in an instruction that stated that information relates to the national defense if, *inter alia*, its sources are not available to the public and the United States has made efforts to guard the information.[15] At all events, as the court of appeals noted (Pet. App. 74a), the trial judge admonished the jury that petitioners could not be found guilty of transmitting national defense information if the transmitted information had previously been publicly available. Accordingly, taken as a whole (*Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973)), the instructions tended to minimize the significance of the fact that the documents were classified.

4. Petitioner Truong next contends (Pet. 21-23) that his unauthorized transmittal of information copied from government documents did not constitute a theft of government property within the meaning of 18 U.S.C. 641, and that, insofar as that statute is construed to cover

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[15] Petitioner's argument (Pet. 19-20 n.17) that the espionage statutes protect only "information" and not "documents" relating to the national defense is incorrect. On its face, Section 794(a) protects, *inter alia*, "any document, writing, * * * note, * * * or information relating to the national defense," and the indictment here was framed in similar terms. Moreover, in prosecutions such as this there is little, if any, real distinction between documents and the information they contain. Cf. *Scarbeck* v. *United States*, 317 F.2d 546, 550 (D.C. Cir. 1962), cert. denied, 374 U.S. 856 (1963); *United States* v. *Lambert*, 446 F. Supp. 890, 895-896 (D. Conn. 1978). Thus, the trial court did not err in alluding to both "documents" and "information" relating to the national defense in its jury instructions.

theft of information, it violates the First Amendment. These contentions do not warrant review.

a. In the first place, petitioner's concurrent five-year sentence on the Section 641 offense (Count 5) was equal to or less than the term of imprisonment imposed on every other count except Count 2, on which petitioner received a two-year sentence for conspiracy to convert classified documents. Having affirmed petitioner's conviction on these other charges, a majority of the court of appeals did not reach petitioner's argument concerning the reach of Section 641 (Pet. App. 77a-79a). Likewise, if this Court concludes that it will not review the court of appeals' affirmance of any of the convictions carrying sentences equal to or greater than that imposed on Count 5, it need not review that conviction. See *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973). In any event, petitioner's contentions are without merit.

b. Section 641 protects records or "any * * * thing of value of the United States." Nothing in the statute's language or legislative history suggests that Congress intended to exclude intangible property from the statute's coverage. On the contrary, Congress's use of the all inclusive phrase "thing of value" evinces a purpose to protect every conceivable form of government property from an unauthorized taking or use. Absent clearly expressed legislative intent to the contrary, Congress's choice of language must be regarded as conclusive. *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 105 (1980). Petitioner does not, and could not plausibly, argue that the stolen information had no value,[16] and information, though intangible, is a "thing" within the meaning of Section 641. See *United States* v. *Girard*, 601 F.2d 69, 71 (2d Cir.), cert. denied, 444 U.S. 871 (1979), and cases cited therein.

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[16] The government's evidence showed that "each of [the] documents would be worth more than $100 if sold to a foreign intelligence service" (Tr. 552-553; C.A. App. 1889-1890).

Had petitioners taken the original government documents, there could be no doubt of their culpability under Section 641. It is therefore untenable to conclude that copies of such documents and the information they contain are not also protected by the statute. "[F]requently the transmission of information contained in documents is just as larcenous as theft of the documents themselves." *United States* v. *Rosner*, 352 F. Supp. 915, 922 (S.D.N.Y. 1972), modified on other grounds, 485 F.2d 1213 (2d Cir. 1973), cert. denied, 417 U.S. 950 (1974). Thus, as the Third Circuit concluded in *United States* v. *DiGilio*, 538 F.2d 972, 977 (1976), cert. denied, 429 U.S. 1038 (1977), "[a] duplicate copy is a record for purposes of the statute." [17]

c. There is likewise no merit to petitioner's contention (Pet. 22-23) that construing Section 641 to embrace classified national security information renders the

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[17] In *United States* v. *Lambert*, *supra*, a case involving the theft of information stored in a DEA computer, the court held (446 F. Supp. at 895; footnote omitted) that there was

> no reason to restrict the scope of § 641 to the theft of government paper and ink, or to unauthorized reproduction. The phrase "thing of value" in § 641, in conjunction with the explicit reference to "any record," covers the content of such a record.

See *United States* v. *Friedman*, 445 F.2d 1076, 1087 (9th Cir.), cert. denied, 404 U.S. 958 (1971) (prosecution under Section 641 for disclosure of grand jury records); *United States* v. *DiGilio*, *supra*, 538 F.2d at 977-978 (information from FBI files); *United States* v. *Rosner*, *supra*, 352 F. Supp. at 919-922 (information from a United States Attorney's files).

Cases decided under analogous theft and fraud statutes have also found intangible items such as information to be "goods" or "property." *United States* v. *Louderman*, 576 F.2d 1383, 1387-1388 (9th Cir.), cert. denied, 439 U.S. 896 (1978) (confidential user information owned by the telephone company); *United States* v. *Bottone*, 365 F.2d 389, 393-394 (2d Cir.), cert. denied, 385 U.S. 974 (1966) (duplicate copies of corporate trade secrets); *United States* v. *Lester*, 282 F.2d 750, 755 (3d Cir. 1960), cert. denied, 364 U.S. 937 (1961) (photocopies of maps).

statute unconstitutionally vague and overbroad, or otherwise threatens First Amendment values.

To be constitutionally suspect, a statute's detrimental impact on protected expression must be real and "substantial * * * in relation to the statute's plainly legitimate sweep" (*Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973)), and the statute must not be "readily subject to a narrowing construction" by the courts. *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 216 (1975). As a rule, when ordinary criminal laws are challenged on the ground that they may be applied improperly to conduct protected by the First Amendment, "overbreadth claims, if entertained at all, have been curtailed." *Broadrick* v. *Oklahoma*, *supra*, 413 U.S. at 613. Statutes punishing conspiracy, criminal trespass, or perjury cover a wide range of conduct which may be predominantly or even exclusively "expressive," but the courts nonetheless have concluded that such conduct is subject to legitimate governmental regulation. In such instances, "facial invalidation is inappropriate" even if there are "marginal applications" in which First Amendment values would be infringed. *Parker* v. *Levy*, 417 U.S. 733, 760 (1974). The overbreadth doctrine becomes less forceful

> as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.

Broadrick v. *Oklahoma*, *supra*, 413 U.S. at 615.

By prohibiting the embezzlement, theft, conversion, and unauthorized conveyance or disposal of all forms of government property, Section 641 "covers a whole range of easily identifiable and constitutionally proscribable * * * conduct." *United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548,

581 (1973). Nothing on the face of the statute purports to punish the "discussion" or "publication" of government information.[18] Rather, Section 641 simply punishes the illegal taking of protected government property, including documents and information. The statute does not violate the First Amendment because, as this Court has recognized, that Amendment does not guarantee an unlimited right of access to all sources of information within government control. See *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 9 (1978).

Moreover, Section 641 is readily susceptible to a "narrowing construction" by reference to prior judicial interpretations (see, *e.g.*, *Ward* v. *Illinois*, 431 U.S. 767, 775-776 (1977)) and administrative regulations. See *United States* v. *Ramsey*, *supra*, 431 U.S. at 623-624 & n.18; *Broadrick* v. *Oklahoma*, *supra*, 413 U.S. at 616-618 & nn. 14-16. In *United States* v. *Lambert*, *supra*, where the defendant was prosecuted for divulging secret DEA information to a drug dealer, the court found that any overbreadth problems were cured by Department of Justice and DEA regulations that specifically precluded the release of the type of information at issue.[19] Here, as in *Lambert*, the converted documents and information were classified pursuant to Exec. Order No. 11652, 3 C.F.R. 678 (1971-1975 Comp.) as affecting the nation's security, and their public dissemination was expressly exempted from public disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(1)(A). See *Weinberger* v. *Catholic Action of Hawaii*, No. 80-1377 (Dec. 1, 1981), slip op. 5. As applied to the circumstances of this case, therefore,

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[18] We, of course, are in full agreement with the proposition that discussion of government affairs is "integral to the operation of the system of government established by our Constitution." *Buckley* v. *Valeo*, 424 U.S. 1, 14 (1976). Our position is that Section 641 does not, in any sense, operate as a restraint on the public discussion of information.

[19] See also *United States* v. *Friedman*, *supra*, 445 F.2d at 1087 (Fed. R. Crim. P. 6(e) prohibited disclosure of grand jury information).

Section 641 falls far short of endangering protected First Amendment speech or conduct.

5. Petitioner Truong finally contends (Pet. 24-26) that the government improperly withheld certain statements by Dung Krall that could have been used to impeach Krall's trial testimony and that the courts below erred in concluding (Pet. App. 80a-87a, 89a-95a) that any error was harmless. This fact-bound claim does not merit this Court's review.

a. Krall testified that while she was in Paris she met with Phan Thanh Nam, head of the Vietnamese mission (C.A. App. 1622-1623). During the meeting, Krall asked Nam if he knew petitioner Truong. Nam replied that he knew "of him," although they had never met, and that he "is one of our people in Washington" (C.A. App. 1624). After this episode, Robert Hall, a CIA officer and Krall's "contact," prepared an account of the conversation between Krall and Nam. Hall's account, which was not furnished to the defense, did not mention Nam's statement concerning petitioner to which Krall referred at trial.[20]

In rejecting the claim that the failure to provide counsel with this report required a new trial, the district court explained (Pet. App. 83a):

> The significance [of the reference to Truong as "one of our people in Washington," which was omitted in the report] is weakened substantially * * * when the dates of the items are taken into account. In September of 1976 Krall's contacts with Truong were minimal. He was not the focus of the foreign intelligence inquiry (the one Hall, the CIA agent, and the person making these reports, was interested

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[20] Because Hall was called as a defense witness the government was not obliged under the Jencks Act, 18 U.S.C. 3500(b), to provide the defense with copies of his reports. Petitioner argued, however, that he was entitled to at least those portions of Hall's reports that appeared to contain verbatim accounts of Krall's statements.

> in) and did not become so until later in 1977. Moreover, the court finds that the remark[] concerning "one of our people in Washington" was contained in a report to FBI Agent Fleshman (the person who was interested in domestic involvement) in September, 1976. * * * Had the absence of such a remark in the reports of Hall been brought out by the defense at trial, surely the government could and would have countered by showing, through Fleshman, that such a remark had, in September, 1976, been reported by Krall to him. Thus there is shown no prejudice to the defense by not having the Hall reports which omitted the remark. As to the exculpatory nature of the failure to mention David Truong, the court is satisfied that with all of the other evidence in this case the omission * * * would not have affected the outcome of the trial or created a reasonable doubt of the defendant's guilt that did not otherwise exist. *United States* v. *Agurs*, 427 U.S. 97, 104, 112 (1976).

Petitioner has presented no specific arguments rebutting the district court's views, and we rely on its analysis.

b. Petitioner contends that he was denied the opportunity to impeach Krall with a second asserted discrepancy between her testimony and a CIA report. He states (Pet. 24) that Krall testified that she observed "a package" being handed to Vietnamese officials, and identified this package as the one that contained the stolen cables. According to petitioner, the undisclosed CIA report stated that the package transferred was one that had not been opened by the FBI and, therefore, not the one that contained the cables.

As the district court noted (Pet. App. 83a), the CIA document in question was a cable authored by Hall that "does not purport to be a verbatim statement of or signed or otherwise adopted by Krall. It is not a Jencks Act statement." Thus, petitioner was not entitled to this item unless it contained exculpatory material. See *Brady* v.

Maryland, 373 U.S. 83 (1963). However, petitioner's claim of entitlement rests upon an incomplete version of Krall's testimony about the package transfer (see C.A. App. 1643-1645). Krall did not testify that the bookbag package was the only package that she saw being turned over to Vietnamese officials. Rather, her testimony was that *two* packages were turned over—one the bookbag containing the cables, and the other a package of unknown contents given to her by Truong on another occasion in April 1977. The CIA report states that this second package was given to Vietnamese officers, but it is silent as to the bookbag. Thus, it does not significantly contradict or otherwise impeach Krall's testimony that two packages were delivered at the time in question. Moreover, because virtually the same information was contained in an FBI report that was furnished to the defense (see Pet. App. 83a), the withheld report "would have told defendants nothing that they did not already know" (*id.* at 92a).

At all events, even if petitioner's Jencks Act and *Brady* claims were accepted at face value, they would not require reversal for the reasons set out by the district court (Pet. App. 86a-87a; footnote omitted):

> [P]roduction of the documents at trial would not have changed the verdicts in this case in the slightest. The evidence of guilt in the case on matters which did not depend upon those parts of Krall's testimony sought to be impeached was substantial to say the least. The cross-examination of Krall was as vigorous, competent and thorough as any the court has witnessed. Because she was a paid informant, the jury was cautioned that her testimony should be carefully weighed and tested before giving it unlimited credence and that it was not safe to accept it as conclusive unless it was corroborated by the testimony of other persons or by facts and circumstances clearly tending to support it. The court therefore rejects the argument that the evidence omitted * * * could conceivably have added anything

to the impeachment of Ms. Krall or the exculpation of the defendants. Certainly that evidence is insufficient to create a reasonable doubt that did not otherwise exist.

CONCLUSION

The petitions for a writ of certiorari should be denied.

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DECEMBER 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 359760 719

Petitioner's Reply Brief

Office - Supreme Court, U.S.
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No. 81-631

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v.

UNITED STATES OF AMERICA.

PETITIONER TRUONG'S REPLY MEMORANDUM

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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PETITIONER TRUONG'S REPLY MEMORANDUM

The government in opposition relies on the justification of "consent" for the warrantless search of the package of papers given to Krall in April 1977.[1] As this theory was not mentioned in the judgment and opinion of the United States Court of Appeals for the Fourth Circuit of which we seek review, and had been previously rejected by the District Court, it is appropriate that we respond prior to the Court's consideration.

The failure of the government in opposition to support (or even mention) the rationale of the Fourth Circuit that, because the package was unsealed and might be inspected on crossing boundaries, Truong did not have a legitimate expectation of privacy in the package. (Pet. App. 44a), is an apparent concession of the novelty and scope of the exception to the warrant requirement thus created. The claim that Krall's "consent"

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[1] No claim of a "foreign intelligence" exception is made for this search. This initial warrantless search provided the grounds for the subsequent "authorized" warrantless searches and seizures.

obviated Truong's Fourth Amendment rights is no less an assertion of a new exception to the warrant requirement. Purportedly relying on the Fourth Circuit authority of *United States* v. *Carter*, 569 F.2d 801 (1977), never cited in the opinion below, the government fails to mention that the "consent" agreement had been previously considered and rejected.

In the District Court, the government agreed that the April package was not suppressible on both a "consent" theory and a "reasonable expectation of privacy" theory. Only the "second argument" obtained approval. (Pet. App. 19a). As to the "consent" theory, the District Court went on to make the following finding of fact: "The record is barren of any indication that the Asset [Krall] shared with Hung [Truong] any "joint " possession or other relationship with the documents whatsoever. She was, as far as Hung [Truong] was concerned, the personal equivalent of United Parcel Service; that is, a non-governmental courier." (Pet. App. 24a). A further finding was made that Krall was "an operative of the government acting under their direction and control." (Pet. App. 25a). The "consent" argument was then rejected: "[t]o accept her consent as binding on the defendant and to construe it broadly is paramount to allowing the government to itself consent to searches on behalf of a defendant, clearly an unacceptable result." (Pet. App. 25a-26a). The government in opposition presented no argument rebutting the district court's opinion.

While attempting to avoid review of the Fourth Circuit's holding that petitioner had no reasonable expectation of privacy because a package of documents and papers was unsealed (compounding First Amendment concerns with the issues pending before this Court in *United States* v. *Ross*, 655 F.2d 1159 (D.C. Cir.), *cert. granted*, No. 80-2209 (Oct. 13, 1981)), the government has substituted a theory both inconsistent with this Court's prior holding that third party consent requires "common authority over or other sufficient relationship to the premises or

effects sought to be inspected," *United States* v. *Matlock*, 415 U.S. 164, 171 (1974), and illogical in permitting the government to consent to searches it itself conducts.

This multiplication of novel exceptions to the warrant requirement served as predicate to the extensive warrantless electronic surveillance in the District of Columbia. The case presents the central issue of the meaning of the Fourth Amendment and merits review by the Court.

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ALEXANDER L. STEVAS,
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Nos. 81-5344 and 81-631

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RONALD LOUIS HUMPHREY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

TROUNG DINH HUNG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN FRIENDS SERVICE COMMITTEE, THE NATIONAL COUNCIL OF CHURCHES, AND THE NATION INSTITUTE IN SUPPORT OF THE PETITIONS FOR CERTIORARI

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BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONS FOR CERTIORARI

Amici curiae, the American Civil Liberties Union, the American Friends Service Committee, the National Council of Churches, and the Nation Institute, urge this Court to grant the petitions for certiorari because of the extraordinary importance of one of the issues presented —whether the Attorney General can authorize physical searches and electronic surveillances in foreign intelligence investigations without obtaining a warrant from a neutral

and detached magistrate.[1] All parties have consented to the filing of this brief, and the letters of consent have been filed with the Clerk.

INTEREST OF AMICI CURIAE

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members, dedicated solely to defending the principles of freedom embodied in the Bill of Rights. Among those freedoms is the right of privacy which the Fourth Amendment protects by requiring, with only a few narrow exceptions established by this Court, that neutral and detached magistrates rather than law enforcement officials determine when the government can search the houses, papers, and effects of the people. The ACLU believes that the decision below is a serious inroad on this principle which merits the Court's review.

The American Friends Service Committee carries on religious, charitable, social, philanthropic, and relief work in the United States and abroad on behalf of the several branches and divisions of the Religious Society of Friends in America. AFSC opposes the use of force in the resolution of conflicts among nations. To this end it seeks to establish dialogue and achieve reconciliation between governments and peoples of various countries in conflict, including those in conflict with the United States. These efforts are severely chilled if the government is permitted to disregard constitutional protections on the ground that ill-defined national security interests are involved. AFSC

[1] In focusing on this one issue, *amici* do not mean to imply that the other issues presented by petitioners are not worthy of this Court's review. They are. But the government's assertion of authority to disregard the Fourth Amendment warrant requirement is of exceptional importance.

believes that the decision below is a serious threat to its efforts to communicate with people of all nations in wholly lawful endeavors and is also a grave injustice to petitioners.

The National Council of Churches of Christ in the United States of America is a cooperative agency of thirty-two national religious bodies, Protestant and Eastern Orthodox, with an aggregate membership of over forty million people. NCC has been concerned about this case from its inception because of the serious Fourth Amendment issue it raises. Through its Ecumenical Minority Bail Fund, NCC has contributed to the bail for both petitioners.

The Nation Institute is a non-partisan, non-profit organization committed to defending and extending the freedoms protected in the Bill of Rights, with special emphasis on the First Amendment freedoms of speech, press, and assembly. A fundamental premise underlying the Bill of Rights is that the Executive Branch is bound by the law, and the Institute opposes claims such as those made in this case that there is inherent presidential authority to set aside constitutional requirements on national security grounds. Since the Fourth Amendment is a bulwark against erosion of the freedoms protected by the First Amendment, the Institute is particularly concerned with the issue raised in this case.

ARGUMENT

THIS COURT SHOULD DECIDE WHETHER THE FOURTH AMENDMENT PERMITS THE ATTORNEY GENERAL TO CONDUCT PHYSICAL SEARCHES AND ELECTRONIC SURVEILLANCES IN FOREIGN INTELLIGENCE INVESTIGATIONS WITHOUT OBTAINING A WARRANT FROM A NEUTRAL AND DETACHED MAGISTRATE

This case is of exceptional importance because it presents a rare opportunity to test the Executive Branch's assertion that it can conduct searches – both physical and electronic – in foreign intelligence investigations without obtaining a warrant from a neutral and detached magistrate. As the late Judge Leventhal pointed out, the "very assertion" of such an exception to the Fourth Amendment "accomplishes some diminution of the sense of privacy of all," and "[t]he problem is deepened by the reality than any executive action on the basis of the asserted exemption will be unknown." *United States v. Ehrlichman*, 546 F.2d 910, 936 (D.C. Cir. 1976)(concurring opinion), *cert. denied*, 429 U.S. 1120 (1977). Here, however, petitioners' convictions rest on the fruits of both physical searches of packages and massive electronic surveillance of one of their homes. Since this is a case where warrantless national security searches have come to light, the Court should determine whether there is such an exception to the Fourth Amendment.

Moreover, this case is different in two crucial respects from other cases involving warrantless foreign intelligence electronic surveillance which have been brought to the Court's attention.[2] This is the only case where a defendant

[2] *United States v. Buck*, 548 F.2d 871 (9th Cir.), *cert. denied*, 434 U.S. 890 (1977); *United States v. Butenko*, 494 F.2d 593 (3d Cir.) *(en banc), cert. denied*, 419 U.S. 881 (1974); *United States v. Brown*, 484

was the target of the challenged surveillance, and it is the only case where the fruits of the surveillance were used against a defendant. In *Buck, Butenko, Brown,* and *Clay,* the challenged surveillances were directed at other parties, and defendants were incidentally overheard in the course of those surveillances. Indeed, in *Butenko* the government conceded that its warrantless surveillance of the home of one of the defendants was illegal, and the dispute centered on surveillance directed at premises in which defendants had no interest. 494 F.2d at 597, 608, 617. *See United States v. Butenko,* 318 F. Supp. 66, 68 (D. N.J. 1970).

Again and again, this Court has stressed that the Fourth Amendment requires the government to obtain the determination of a neutral and detached magistrate that a proposed search of a person's house, papers, or effects is reasonable before the government may conduct the search. *E.g., Steagald v. United States,* 101 S.Ct. 1642, 1649 (1981); *United States v. Chadwick,* 433 U.S. 1, 9-12 (1977); *Coolidge v. New Hampshire,* 403 U.S. 443, 449-454 (1971); *Mancusi v. DeForte,* 392 U.S. 364, 371 (1968); *Katz v. United States,* 389 U.S. 347, 356-359 (1967); *McDonald v. United States,* 335 U.S. 451, 455-456 (1948); *Johnson v. United States,* 333 U.S. 10, 13-14 (1948). The few exceptions to this requirement are narrow and rest on considerations of exigency. But most important in terms of whether the Court should review this case, exceptions to the warrant requirement are "specifically established and well-delineated" by this Court rather than by executive fiat. *Katz v. United States, supra,* 389 U.S. at 357.

F.2d 418 (5th Cir. 1973), *cert. denied,* 415 U.S. 960 (1974); *United States v. Clay,* 430 F.2d 165 (5th Cir. 1970), *rev'd on other grounds,* 403 U.S. 698 (1971).

The point of requiring a neutral and detached magistrate to pass on a search application is that law enforcement officials "engaged in the often competitive enterprise of ferreting out crime" cannot be entrusted with deciding when their mission must override a person's right to privacy. *Johnson v. United States, supra,* 333 U.S. at 13-14. "Whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement." *Shadwick v. City of Tampa,* 407 U.S. 345, 350 (1972). The government asserts that in the area of foreign intelligence investigations this principle may be abandoned and that the Attorney General – who in this case was personally supervising the investigation – may decide whether a search is permissible. But the consistent judgment of this Court has been that "prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations – the 'competitive enterprise' that must rightly engage their single-minded attention." *Coolidge v. New Hampshire, supra,* 403 U.S. at 450.

The separation of responsibility between law enforcement officials and magistrates is so fundamental and so important that the Court has held that even searches in the sensitive area of internal security intelligence investigations are subject to the warrant requirement. *United States v. United States District Court,* 407 U.S. 297 (1972) *("Keith").* Indeed, the interposition of a neutral magistrate is all the more necessary in "[n]ational security cases" because they "often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime." *Id.* at 313. The issue in the instant case is only one step beyond the issue decided in *Keith* – whether the warrant requirement extends to searches in foreign intelligence as well as in domestic intelligence investigations

– and is just as important as the Court recognized that case to be. *See* 407 U.S. at 299.

In the proceedings below, the government suggested that this case is of little consequence to anyone other than the two petitioners because the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1801 *et seq.*, was enacted after petitioners were indicted and now requires the government to obtain a judicial warrant for electronic surveillance of suspected foreign agents. This argument overlooks the fact that FISA only requires warrants for electronic surveillance and not physical searches, which are also a critical part of this case. As recently as June 3, 1981, the Department of Justice asserted to the Foreign Intelligence Surveillance Court – which was established under FISA, 50 U.S.C. § 1803 – that "the President and by delegation, the Attorney General have constitutional authority to approve warrantless physical searches directed against foreign powers or their agents for intelligence purposes." Addendum at 9a. The only decisional support cited for this proposition was the decision below. *Id.* at 10a.[3]

This frightening assertion demonstrates the broad and continuing importance of this case and the need for review by this Court. Anyone suspected by the Executive Branch

[3]The Justice Department's memorandum of law to the Foreign Intelligence Surveillance Court arguing that that court has no jurisdiction over physical searches and that the President has inherent authority to conduct physical searches of foreign agents is set out in the addendum to this brief. The Surveillance Court agreed that it lacks jurisdiction over physical searches although it expressed no view on the claim of presidential authority. *In the Matter of the Application of the United States for an Order Authorizing the Physical Search of Nonresidential Premises and Personal Property* (FISC, June 11, 1981).

of being an agent of a foreign power is subject to searches of his house, papers, and effects without a determination by a neutral magistrate that the intrusion is justified. Who qualifies as a foreign agent? Since the government maintains that FISA has no applicability to physical searches, the government believes that it is not bound by the Act's relatively narrow definition of "agent of a foreign power." 50 U.S.C. § 1801(b). Thus, the government believes that it is free to define for itself who qualifies and may range broadly from Soviet spies to Americans who voice support for the insurgents in El Salvador, officials of the United Jewish Appeal, union leaders who support the Solidarity Movement in Poland, attorneys who represent lawful foreign interests, or anyone else thought to be an agent of some foreign power or cause.[4]

Under this regime Executive Branch officials charged with investigative responsibility can authorize searches, and this is precisely contrary to the Fourth Amendment's requirement that only neutral and detached magistrates can authorize searches, absent exigent circumstances. Accordingly, this case presents an issue concerning the meaning of the Fourth Amendment of continuing and paramount importance.

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[4]The current Executive Order on intelligence activities, No. 12036, 3 C.F.R. 112 (1978 Comp.), has no definition of "agent of a foreign power," even though the term is central to determining who can be subjected to warrantless searches. E.O. 12036, §§ 2-201, 2-204, 3 C.F.R. at 126.

CONCLUSION

The Court should grant the petitions for certiorari.

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November, 1981

UNITED STATES
FOREIGN INTELLIGENCE SURVEILLANCE COURT
WASHINGTON, D.C.

IN THE MATTER OF THE	)	
APPLICATION OF THE UNITED	)	
STATES FOR AN ORDER	)	Docket Number
AUTHORIZING THE PHYSICAL	)	81-
SEARCH OF NONRESIDENTIAL	)	
PREMISES AND PERSONAL	)	
PROPERTY	)	

MEMORANDUM OF LAW

This Memorandum of Law is being filed in connection with an application for the FBI to undertake a physical search of nonresidential premises under the direction and control of a foreign power and of personal property of agents of a foreign power on those premises. The search would not require nonconsensual entering of the real property in question.

This application is being presented to the Foreign Intelligence Surveillance Court (hereinafter referred to as FISC) for a determination whether the judges of the FISC have the authority to review and approve physical searches for foreign intelligence purposes. The Government believes that judges of the FISC have no statutory, implied, or inherent authority to approve physical searches for intelligence purposes. Yet, because three prior physical

searches were presented to and approved by the Court, the Government believes it is advisable to obtain a determination by the FISC of its authority to review such applications.[1]

Should the FISC hold that it has no authority to approve physical searches undertaken for foreign intelligence purposes, then such searches will continue to be reviewed and approved by the Attorney General pursuant to the standards and authority delegated by the President.

ARGUMENT AND AUTHORITIES

There are two possible grounds for an assertion of jurisdiction by the FISC: one based on its enabling statute and the other based on an inherent or implied authority derived from the Constitution or from a legislative regulatory scheme. Neither of these grounds provides a basis for the assertion of jurisdiction over intelligence physical searches by the FISC or its judges.

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[1]The basis for the presentation of these applications to the FISC was a policy judgment by former Attorney General Civiletti. *See* Memorandum for FBI Director William H. Webster from Kenneth C. Bass, III, Re: Jurisdiction of Foreign Intelligence Surveillance Court Judges to Issue Orders In Foreign Intelligence Investigations, dated October 14, 1980 (hereinafter referred to as Justice Department Memorandum, October 14, 1980). This policy decision has been subject to criticism, particularly with regard to the jurisdiction of the FISC to approve such matters. *See* Memorandum to Judge Hart from Robert S. Erdahl, dated October 30, 1980; H.R. Rep. No. 1466, 96th Cong., 2d Sess. 5 (1980); S. Rep. No. 1017, 96th Cong., 2d Sess. 9-10 (1980).

A. The Foreign Intelligence Surveillance Act of 1978 Does Not Empower the FISC To Review Intelligence Physical Searches

The FISC, and the judges serving by designation on the court, have limited statutory authority that does not include reviewing intelligence physical search applications. The Foreign Intelligence Surveillance Act of 1978 (hereinafter referred to as the Act or FISA), 50 U.S.C. § 1801, *et seq.*, provides that the FISC "shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States under the procedures set forth in the Act." FISA, § 103(a). No provision in the Act extends that mandate to intelligence searches, and the legislative history unambiguously indicates that the Congress did not intend anything in the Act to empower the FISC to consider physical searches or the opening of mail for intelligence purposes. H. Rep. No. 1283, 95th Cong., 1st Sess. 53 (1978); S. Rep. No. 604, 95th Cong., 1st Sess. 6 (1977).

Judges of the FISC cannot derive this jurisdiction from any other statutory authority. Title III of the Omnibus Crime Control and Safe Streets Act provides no basis for authority in the FISC because it does not govern searches for foreign intelligence purposes. *See, e.g., United States* v. *United States District Court,* 407 U.S. 297 (1972). Moreover, Rule 41 of the Federal Rules of Criminal Procedure, which empowers federal courts to authorize physical searches in a law enforcement context, permits searches solely to gather evidence of a crime, and its attendant procedures and limited jurisdictional grant are inappropriate for intelligence searches. Fed. R. Crim. P. 41 (b), (c), (d).

B. The FISC Has Neither Inherent Nor Implied Authority to Review Intelligence Physical Search Applications

The FISC has neither inherent nor implied authority to review intelligence physical searches merely because Fourth Amendment considerations are involved.[2] Under the Constitution, the jurisdiction and authority of lower federal courts is determined by express grant from Congress.[3] Courts have carved out three exceptions to this general rule and have asserted authority over matters beyond their statutory grant of jurisdiction (1) to ensure the integrity of the judicial process, (2) to carry out Congress' intent in enacting a regulatory scheme, and (3) to provide judicial review where the Constitution so requires.[4] None of these three exceptions provides a basis for the FISC to extend its jurisdiction and authority beyond its limited legislative grant.

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[2]A contrary position was elaborated in a Justice Department memorandum in support of the policy decision to submit the prior applications for FISC review. Justice Department Memorandum, October 14, 1980, *supra* note 1.

[3]U.S. Const., art. III, § 1. *Ex parte Bollman,* 8 U.S. (4 Cranch) 75, 93 (1970); *Marshall v. Gibson's Products, Inc.,* 584 F.2d 688, 672[sic] (5th Cir. 1979).

[4]Courts asserting such extra-statutory power have often stated that they were relying on their "inherent" powers. Yet, they fail to articulate a persuasive theory identifying the source or nature of such authority. These powers can be better described as "implied" powers which are derived from a statutory scheme or from constitutional requirements. Regardless of the nomenclature applied to these powers, however, the government contends that they do not authorize FISC review of foreign intelligence physical searches.

1. Authority To Ensure the Integrity of the Judicial Process

Courts have asserted extra-statutory power and authority to preserve the integrity of the judicial process and to control those appearing before them. *Osborn* v. *United States,* 385 U.S. 323 (1966) (authorizing electronic surveillance of member of bar suspected of attempting to bribe a member of a jury panel in a prospective federal criminal trial); *Go-Bart Co.* v. *United States,* 282 U.S. 344, 355 (1931) (asserting inherent authority to discipline prosecutor and prohibition agent and to suppress and return unlawfully obtained evidence); *Hunsucker* v. *Phinney,* 497 F.2d 29, 32-33 (5th Cir. 1974), *cert. denied,* 420 U.S. 927 (1975) (establishing power of federal court to order the suppression or return of illegally seized property even though no criminal proceedings had commenced and even though no statute authorized such action). Extra-statutory powers also have been asserted to ensure that statutory procedures regulating searches and seizures for law enforcement purposes were properly observed by federal law enforcement agents. *Rea* v. *United States,* 350 U.S. 214, 217 (1956). Because intelligence physical searches do not affect the integrity of any judicial process, this rationale certainly cannot justify the assertion of FISC jurisdiction to approve such searches.

2. Jurisdiction Implied From A Regulatory Scheme

Federal courts have asserted extra-statutory power to issue search warrants to implement regulatory statutes where Congress has failed explicitly to provide for warrants, but where failure to issue such warrants would frustrate the statutory scheme by rendering inspections contemplated by the statute unlawful. For example,

following the Supreme Court's ruling in *Marshall* v. *Barlow's Inc.*, 436 U.S. 307 (1978), that warrantless OSHA inspections violated the Fourth Amendment, lower courts presented with applications for OSHA inspection warrants have accepted jurisdiction over these petitions. In *Marshall* v. *Shellcast Corp.*, 592 F.2d 1369, 1370-71 n.3 (5th Cir. 1979), the Fifth Circuit found jurisdiction in the district court to issue an OSHA inspection search warrant:

> We note that the evidence of Congress' concern about the constitutionality of OSHA searches . . . when viewed in connection with the Supreme Court's ruling in *Barlow's supra,* argues strongly for the position that federal courts do have jurisdiction to issue OSHA search warrants. We also note that numerous courts have reached this result, and that none has held otherwise.

Most of the courts asserting jurisdiction over OSHA search warrants have described their authority to be an "inherent" power of the courts or magistrates, *e.g., Empire Steel Manufacturing Co. v. Marshall,* 437 F. Supp. 873, 881 (D. Mont. 1977); *In The Matter of Urick Property,* 472 F. Supp. 1193, 1194 (W.D. Pa. 1979), or an unarticulated assertion of federal judicial power. *In re Worksite Inspection of Quality Products, Inc.,* 592 F.2d 611 (1st Cir. 1979); *Marshall* v. *Burlington Northern, Inc.,* 595 F.2d 511, 514 (9th Cir. 1979) (dicta); *Marshall v. Chromalloy American Corp.,* 433 F. Supp. 330 (E.D. Wis. 1977), *aff'd sub nom. In The Matter of Establishment Inspection of Gilbert and Bennett Manufacturing Co.,* 589 F.2d 1335 (7th Cir. 1979); *Marshall* v. *Reinhold Construction Inc.,* 441 F. Supp. 685 (M.D. Fla. 1977). However, none of these courts analyzed with any rigor the source for their authority over the inspection petitions. *See also United States* v. *Dalia,* 441 U.S. 238 (1979) (Title III impliedly

authorized entry to install eavesdropping equipment).

The extra-statutory jurisdiction asserted in these cases can best be described as "implied" jurisdiction because the courts acted in each case to implement a legislative scheme that had not explicitly anticipated the need for judicial involvement to enforce the statute. In each case, there existed a clear legislative intent that the regulatory searches be carried out. Also, the Constitution required that prior judicial review be obtained in order for those searches to be lawful. The courts, therefore, implied their jurisdiction to issue inspection warrants from the OSHA statutory scheme and the evident congressional desire to legislate an effective and constitutional statute.

The acceptance of "implied" jurisdiction in the OSHA cases, however, provides no authority for FISC's assertion of jurisdiction over intelligence physical searches. Two critical factors present in the OSHA cases are not met here. First, as discussed at pp. 2-3, *supra,* the Congress specifically intended not to authorize judicial review of intelligence physical searches when the FISC was established. This fact, alone, undermines any argument that the FISC has "implied" jurisdiction to review intelligence physical searches. Second, as will be shown below, the President has the power to authorize warrantless physical searches for foreign intelligence purposes, and thus there is no constitutional requirement for the FISC to review intelligence physical search applications.

3. Jurisdiction Implied By Constitutional Necessity

Several cases, without reference to any statutory scheme, have suggested that federal courts may assert extra-statutory powers to issue search warrants where the Fourth Amendment requires prior judicial review of a par-

ticular governmental activity. In *United States* v. *Giordano,* 416 U.S. 505 (1974), Justice Powell, concurring in part and dissenting in part, recognized that because the pen register was not subject to Title III of the Omnibus Crime Control and Safe Streets Act, "[t]he permissibility of its use by law enforcement authorities depends entirely on compliance with the constitutional requirement of the Fourth Amendment." *Id.* at 553-554. Mr. Justice Powell, and the Court, apparently assumed that federal courts had valid jurisdiction to enforce the warrant requirement of the Fourth Amendment.[5]

This assumption that federal courts have an extra-statutory jurisdiction to authorize pen register searches was also accepted by several courts of appeal which later addressed the issue. *Michigan Bell Telephone Co.* v. *United States,* 565 F.2d 385 (6th Cir. 1977); *United States* v. *Southwestern Bell Telephone Co.,* 546 F.2d 243, 245 (8th Cir. 1976), *cert. denied,* 434 U.S. 1008 (1978); *Application of the United States of America In The Matter of An Order Authorizing the Use of Pen Register or Similar Mechanical Device,* 538 F.2d 956 (2nd Cir. 1976).

The Supreme Court avoided ruling on the question of the extra-statutory powers of federal courts by holding that Rule 41 of the Federal Rules of Criminal Procedure authorized pen register orders. *United States* v. *New York Telephone Co.,* 434 U.S. 159 (1977). However, Justice Stevens, joined in a dissent by Justices Brennan and Marshall, analyzed at length the issue of inherent judicial power to issue pen register warrants and concluded that "the historical and legislative background . . . make it

[5] *See also United States* v. *United States District Court, supra; Katz* v. *United States,* 389 U.S. 347, 354 (1967) (court *sub silentio* affirmed the extra-statutory authority of federal judges to execute warrants authorizing electronic surveillance for law enforcement purposes).

abundantly clear that federal judges were not intended to have any roving commission to issue search warrants." *Id.*, 434 U.S. at 181.

Whether or not federal courts possess extra-statutory powers to issue warrants when required by the Constitution, the FISC would not be empowered to review intelligence physical searches because there is no constitutional necessity to obtain a judicial warrant for the government to engage in a properly authorized intelligence physical search.

The Department of Justice has long held the view that the President and, by delegation, the Attorney General have constitutional authority to approve warrantless physical searches directed against foreign powers or their agents for intelligence purposes. This authority derives from the President's Constitutional powers as Commander In Chief[6] and as the principal instrument for U.S. foreign affairs.[7] The Executive's authority to conduct warrantless foreign intelligence searches and surveillances against foreign powers and their agents has been upheld in every case where the existence of that authority has been necessary to the decision. *United States* v. *Truong*, 629 F.2d 908 (4th Cir. 1980) (physical searches and electronic surveillance); *United States* v. *Buck*, 548 F.2d 871, 875-876 (9th Cir.), *cert. denied sub nom. Ivanov* v. *United States*, 419 U.S. 881 (1974) [sic] (electronic surveillance); *United States* v. *Brown*, 484 F.2d 418 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974) (electronic surveillance); *but see Zweibon* v. *Mitchell*, 516 F.2d 594, 613-614 (D.C. Cir.

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[6]U.S. Const. art. II, § 1.

[7]*United States* v. *Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936); *Chicago and Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948).

1975) (en banc) (plurality opinion) (dicta), *cert. denied*, 425 U.S. 944 (1976) (*Zweibon I*).

The President's power to authorize warrantless intelligence searches has also been upheld by the only appellate court that has considered this question in the context of a physical search of the property of an agent of a foreign power. *United States* v. *Truong, supra,* 629 F.2d at 917 n. 8 (sealed packages and envelopes). In *Truong,* the Court applied the analytic approach for resolving Fourth Amendment problems arising in national security cases suggested in *United States* v. *United States District Court* (*Keith*), 407 U.S. 297, 315 (1972), by balancing individual privacy against the Government's need to protect the national security. The Fourth Circuit concluded,

> [B]ecause of the need of the executive branch for flexibility, its practical experience, and its constitutional competence, the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance. *United States* v. *Truong, supra,* 629 F.2d at 914.

The Fourth Circuit, along with every other appellate court that has reached the issue of the President's inherent authority, thus recognized that the Executive's preeminent responsibilities in foreign affairs and national defense eliminate the need to obtain judicial approval before undertaking electronic surveillance or physical searches for foreign intelligence purposes.[8]

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[8]The enactment of the Foreign Intelligence Surveillance Act of 1978 followed the *Truong* decision. While the Act creates a statutory process for obtaining judicial approval of intelligence-related electronic surveillance in the United States, it did not purport to deal with electronic surveillance abroad or with physical searches for intelligence purposes in the United States or abroad. *See* pp. 2-3, *infra.*

The Attorney General, pursuant to a delegation of authority by the President, has the power to approve this proposed physical search of the nonresidential premises under the direction and control of a foreign power and of the personal property of agents of a foreign power on those premises. The Constitution does not require prior judicial review of this search for intelligence purposes. Therefore, the FISC has no basis to assert "implied" jurisdiction under the Constitution in order to review this application.

CONCLUSION

This memorandum of law demonstrates that the FISC has no jurisdiction to review this proposed intelligence physical search. The FISC has neither explicit nor implied statutory authority to review these matters, and the Constitution does not require prior judicial review of intelligence physical searches of foreign powers or their agents when properly authorized by the President or the Attorney General. The Government therefore requests that the FISC reject this application because of its lack of jurisdiction.

Dated: June 3, 1981.

Respectfully submitted,

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Office - Supreme Court, U.S.
FILED
DEC 3 1981
ALEXANDER L. STEVAS
CLERK

No. 81-631

IN THE

Supreme Court of the United States

October Term, 1981

TRUONG DINH HUNG,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF THE CENTER FOR CONSTITUTIONAL RIGHTS AND THE NATIONAL LAWYERS GUILD AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1981

No. 81-631

TRUONG DINH HUNG,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF THE CENTER FOR CONSTITUTIONAL RIGHTS AND THE NATIONAL LAWYERS GUILD AS AMICI CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.*

Statement of Interest

The Center for Constitutional Rights (CCR) and the National Lawyers Guild (NLG) submit this amici curiae brief because of their concern with the Fourth Circuit's decision permitting the President to authorize warrantless wiretapping and bugging based on his sole judgment that it is necessary for the purpose of gathering foreign intelligence information. Amici believe that this sup-

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* All parties have consented to the filing of this amicus brief. See Appendix A.

posed "inherent" power of the President to suspend constitutional guarantees threatens fundamental liberties and is contrary to the Constitution, traditions and values of our nation.

The Center for Constitutional Rights is a non-profit, legal and educational corporation dedicated to advancing and protecting the rights and liberties guaranteed by the Bill of Rights to the United States Constitution.

CCR has a special interest in this case because of its involvement in the successful challenge to the government's former policy of conducting warrantless electronic surveillance on the grounds of "domestic national security." *United States* v. *United States District Court*, 407 U.S. 297 (1972) ("Keith"). CCR believes that the Fourth Circuit's decision in this case substantially undermines the reasoning of this Court in the *Keith* decision.

Significantly Arthur Kinoy, the CCR attorney who argued *Keith* and who is one of the attorneys for amici, has himself been subjected to warrantless electronic surveillance supposedly in the interests of "foreign national security." The constitutionality of this surveillance is now the subject of a federal civil damage suit. *Kinoy* v. *Mitchell*, Dkt. No. 70 Civ. 5698 (S.D.N.Y.).

The National Lawyers Guild was founded in 1937 as a progressive alternative to the American Bar Association. Throughout its history, the Guild has stood firmly in defense of those victims of politically motivated prosecutions whose convictions were secured at the expense of abridging constitutional rights and protections. The NLG believes that the warrantless surveillance of David Truong is violative of the Fourth Amendment and will have a significant adverse impact upon the rights of privacy, communication and association.

As with the CCR, the NLG has a special interest in the issue of warrantless electronic surveillance. The NLG is presently the plaintiff in a major lawsuit seeking injunctive relief and damages against the Attorney General of the United States and others because of, *inter alia*, national security wiretapping directed against the NLG, its member attorneys and clients of those attorneys. *National Lawyers Guild* v. *Attorney General of the United States*, Dkt. No. 77 Civ. 999 (S.D.N.Y.).

Statement of Facts

Amici adopt the "Statement of the Case" as set forth in the petition for certiorari filed on behalf of David Truong. Amici, however, want to stress the particular facts concerning the massive instrusive nature of the warrantless electronic surveillance aimed at petitioner.

The F.B.I. had been closely watching David Truong since September, 1976. Electronic surveillance did not begin until May of 1977. Prior to instituting this warrantless electronic surveillance, the Attorney General admitted that he was investigating "some kind of crime." (Testimony of Griffin B. Bell, Hearing of March 20, 1978, p. 26.) He obviously could have applied for a warrant, but did not choose to do so.

Instead, on May 11, 1977, a warrantless wiretap was placed on David Truong's home phone and ran continuously for 268 days. This wiretap was authorized by the Attorney General. The total number of calls intercepted was in excess of 500, yet only approximately 20 involved Truong's co-defendant Humphrey. A microphone was installed in David Truong's apartment on May 27, 1977. As with the wiretap, the microphone or "bug" was authorized by the Attorney General without a warrant. The "bug" ran continuously for a period of 255 days. *United States* v. *Humphrey*, 456 F. Supp. 51, 59 (E.D. Va. 1978).

The District Court found that all evidence obtained from the surveillance after July 20, 1977, should be suppressed because, after that date, the investigation supposedly shifted from foreign intelligence gathering to the institution of a criminal case against David Truong. However, as to the legality of the surveillance prior to that date, the District Court found there was an exception to the warrant clause for electronic surveillance instituted by the President to gather foreign intelligence information. As a result of this ruling, evidence gathered prior to July 20, 1977 was used against David Truong and played a crucial part in his conviction. *United States* v. *Humphrey*, 456 F. Supp. at 59-60.

The Fourth Circuit affirmed the ruling of the District Court. *United States* v. *Truong*, 629 F.2d 908 (4th Cir. 1980). The circuit held that the President does not have to obtain a warrant if he is "attempting primarily to obtain foreign intelligence" from a foreign power, its agents or collaborators. David Truong was considered to be a "collaborator." *United States* v. *Truong*, 629 F.2d at 915. It is this ruling, holding that the President has inherent power to authorize warrantless electronic surveillance when he believes it is necessary to gather foreign intelligence information, which amici are asking this Court to review.

GROUNDS FOR GRANTING THE WRIT

I.

The claim of the Attorney General to Unlimited Power to Engage in Wholesale Wiretapping of Persons Residing in the United States and the Bugging of their Homes, without regard for the Commands of the Fourth Amendment, and whenever in his sole Judgement it is Required for Purposes of Gathering Foreign Intelligence Information, is Destructive of Fundamental Principles of Liberty Contained in the Constitution and the Bill of Rights.

This case brings to this Court a claim of power asserted by the executive which is without foundation in the Constitution, the decisions of this Court and the traditions and values of a free people. At the heart of the government's position is the bold contention that one man, holding an exalted position, can, in his unreviewable discretion, determine that broad and sweeping electronic surveillance of persons residing in the United States can be undertaken by federal police agents totally without regard for the commands of the Constitution. The government argues that such warrantless electronic surveillance can be undertaken whenever the executive determines, on his own, that the suspension of historic safeguards of personal liberty, enshrined in the mandates of the Bill of Rights, is required in the interest of gathering foreign intelligence information. Unless this claim of power, which was upheld by the Fourth Circuit, is forthrightly repudiated by this Court, our nation will move irretrievably into the shadow of "tyranny and oppression," that Justices Brandeis and Holmes warned against in their classic opinion condemning the "dirty business" of wiretapping. *Olmstead* v. *United States*, 277 U.S. 438, 469, 471 (1928).

This attempt by the executive to brush aside the mandates of the Fourth Amendment, the "neutral and detached magistrate required by the Constitution," *Coolidge* v. *New Hampshire*, 403 U.S. 443, 453 (1971), the historic requirements of probable cause and particularity, *Olmstead* v. *United States*, 277 U.S. 1138 (1928), was soundly rejected by this Court when domestic national security was the stated as a justification. *United States* v. *United States District Court*, 407 U.S. 297 (1972) ("Keith"). It should likewise be rejected here.

This case presents the important and crucial question reserved by this Court in *Keith*, *i.e.*, whether the President has the power to authorize warrantless wiretapping and warrantless "bugging" of a home pursuant to his asserted authority over foreign affairs. Petitioner's conviction at trial rests on the introduction of evidence which was the fruit of such warrantless electronic surveillance.

This issue has never been decided by this Court. In releasing the petitioner on bail, Mr. Justice Brennan stressed the significance of the issue and noted that there was "a difference of view among the Courts of Appeals on this question. Compare *Zweibon* v. *Mitchell*, 170 U.S. App. D.C. 1, 58, 516 F.2d 594, 651 (1975) (*en banc*), with *United States* v. *Butenko*, 494 F.2d 593, 605 (CA 3, 1974) (*en banc*)." *Truong* v. *United States*, 439 U.S. 1326, 1326-27 (1978).

Seemingly unlimited warrantless wiretapping and warrantless bugging was directed against petitioner, a permanent resident of the United States. A "tap" was on his home phone and a "bug" was in his living room. The Fourth Circuit found that, at least up until July 20, 1977, the surveillance was "conducted 'primarily' for foreign intelligence reasons" and that such surveillance did not require a warrant when the "object of the search or the surveillance is a foreign power, its agents or col-

laborators." * Petitioner was considered by the Fourth Circuit to be a "collaborator" of a foreign power. *United States* v. *Truong*, 629 F.2d at 915. Amici believe that the Fourth Circuit's holding negates "one of our 'indispensable freedoms,' the right to be free from unreasonable searches and seizures," *Zweibon* v. *Mitchell*, 516 F.2d at 628. By dispensing with the warrant requirement the circuit has overturned the "historical judgment, which the Fourth Amendment accepts, . . . that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasion of privacy and protected speech." *Keith* at 317.

In upholding the warrantless surveillance herein, the circuit stressed that the executive was "constitutionally designated as the pre-eminent authority in foreign affairs." *United States* v. *Truong*, 629 F.2d at 914. However, just as this Court rejected the government's argument in *Keith* that the President's power to "preserve, protect and defend the Constitution" somehow exempted him from the warrant requirement, so, too, should this Court reject the "talismanic" invocation of foreign affairs as a basis for warrantless surveillance. Such cases as *Oetjen* v. *Central Leather*, 246 U.S. 297 (1918) and *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) "merely substantiate the existence of these powers and legitimate the authority of the President to obtain information necessary to protect the national security from foreign aggression; they do not preordain

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* Despite the broad language of the Fourth Circuit opinion, under the facts of the case, there is no issue presented to this Court of whether warrantless electronic surveillance can be directed against a "foreign government," a faction of a "foreign nation" or an "entity that is openly acknowledged by a foreign government". The Foreign Surveillance Act of 1978, 50 U.S.C. § 1801, permits warrantless surveillance in the above three instances, but not in the case of "collaborators."

the procedures with which the President must comply in exercising that authority." *Zweibon* v. *Mitchell*, 516 F.2d at 616. None of the cases concerning the admittedly broad powers of the President in the conduct of foreign affairs involved the collection and utilization of intelligence information at the expense of fundamental rights guaranteed by our Constitution. Rather, the cases hold that the foreign affairs power and the power of Commander-in-Chief are limited by express prohibitions contained in the Constitution. *United States* v. *Curtiss-Wright Corp; Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952).* There is simply no support in the Constitution for the proposition that the Fourth Amendment applies less fully to the President's power over foreign affairs than to his power to protect and preserve the Constitution.

In arguing that no warrant was necessary, the government in its brief below, relied upon an analysis which was long rejected by this Court. The Government claimed

> there are times when the important individual interests in the warrant procedure necessarily yield to more public concerns. In such circumstances, the validity of the surveillance is not governed by the Warrant Clause but rather is properly tested under the standards of 'reasonableness.'

Govt. Brief, Sixth Cir. at 18.

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* Justice Black, in his last opinion for this Court, reminded the Nation that:

> The amendments were offered to *curtail* and *restrict* the general powers granted to the executive, legislative and judicial branches two years before in the original Constitution. The Bill of Rights changed the original Constitution into a new charter under which no branch of government could abridge the people's freedom of press, speech, religion and assembly. *New York Times Co.* v. *United States*, 403 U.S. 713, 716 (1971) (*concurring opinion* of Justice Black).

Keith flatly rejected testing the validity of search procedures under a "reasonableness" standard and pointed out that this analysis "overlooks the second clause of the amendment," the warrant clause, which is not "dead language." *Keith*, 407 U.S. at 315. The question is rather whether it was reasonable to obtain a warrant. A warrant is

> not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is or should be, an important part of our machinery of government operating as a matter of course to check the well intentioned but mistakenly overzealous executive officers, who are a part of, any system of law enforcement.

Keith, 407 U.S. at 315 quoting *Coolidge* v. *New Hampshire*, 403 U.S. at 481 (1971).

The inquiry in *Keith*, as it must be here, is whether a warrant requirement will better protect Fourth and First Amendment rights, and if so, whether such a requirement would "unduly frustrate the efforts" of the President to protect the national security from foreign intelligence activities. *Keith*, 407 U.S. 315. See *Zweibon*, 516 F.2d at 632-33.

Clearly, a warrant with its requirement of "[p]rior review by a neutral and detached magistrate is the time tested means of effectuating Fourth Amendment rights." *Keith*, 407 U.S. at 318. The opinion of this Court in *Coolidge* v. *New Hampshire* is entirely dispositive of the issue of whether or not a warrant requirement will better protect constitutional rights. In *Coolidge*, in his opinion for the Court, Justice Stewart reminded us once again that a warrant must be issued by the "neutral and detached magistrate required by the Constitution," 403 U.S. 453, and that this requirement is at the very "heart" of the Fourth Amendment.

A warrant requirement not only protects the privacy interests of those the government seeks to overhear, it protects the free and robust exercise of First Amendment rights as well. As *Keith* stressed:

> National security cases, . . . often reflect a convergence of First and Fourth Amendment values not present in cases of "ordinary" crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. "Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power."

Keith, 407 U.S. at 313-14 quoting *Marcus* v. *Search Warrants, etc.*, 367 U.S. 717, 724 (1961).

In this case, as pointed out, the government overheard everything. There was no minimization. Conversations with petitioner's wife, domestic squabbles, arguments, and discussions with journalists, were all included. Moreover, the telephone surveillance continued for 268 days, the bug for 255 days and, although everything after approximately 60 days was excluded from trial, the intrusion on Fourth and First Amendment rights was no less. As the District Court said of the surveillance:

> The intrusion in this case was massive. The interception on Hung's apartment began on May 11, 1977, and ran continuously for two hundred and sixty-eight (268) days. There is a representation in Humphrey's Motion to Suppress at p. 6, that the government estimates the number of calls involving Humphrey intercepted as approximately twenty (20) and the total number of calls intercepted as in excess of 500. The microphone in Hung's apartment was installed May 27, 1977; it too ran continuously and for a period of two hun-

> dred and fifty-five (255) days. It is uncertain how many conversations of defendant Humphrey were monitored.

United States v. *Humphrey*, 456 F. Supp. at 59.

A neutral and detached magistrate would hopefully have never permitted such extensive and massive invasion of Fourth and First Amendment rights. The very manner in which the government conducted the surveillance of David Truong is a textbook example of the need for government compliance with warrant procedures.

In light of the obvious truth that a warrant and prior judicial review safeguards both First and Fourth Amendment rights, the only question is whether requiring a warrant would unduly frustrate the President's efforts to gather foreign intelligence information. *Keith* set forth and rejected each of the possible arguments for abrogating the warrant requirement and the court found that the President's efforts to gather information concerning domestic national security would not be frustrated by following Fourth Amendment procedures. The only difference between this case and *Keith* is the government's talismanic invocation of the word "foreign." Beyond that single word, the considerations raised by the government herein are the same as those in *Keith*. In an analysis based upon *Keith*, the D.C. Circuit in *Zweibon*, which stands in opposition to the Fourth Circuit holding in the instant case, found that a warrant requirement would not frustrate the President's ability to gather foreign intelligence information.

Both *Keith* and *Zweibon* discuss fully and negate any argument that courts lack the judicial competence to evaluate when a warrant is required in either domestic or foreign national security cases. *Keith* points out that "[c]ourts regularly deal with the most difficult issues of

our society," and *Zweibon* found that "judges do, in fact, have the capabilities needed to consider and weigh data pertaining to the foreign affairs and national defense of this nation." *Keith*, 407 U.S. at 320; *Zweibon*, 516 F.2d at 643.

Indeed, the record in this case demonstrates the absurdity of the asserted executive expertise to which the courts are urged to defer. The Attorney General, questioned in this case about whether or not he thought he "had a case of espionage on his hands," answered as follows:

> I felt certain we did, some kind of crime. I'm just a person from Georgia, but I thought if you took documents out of the State Department, you're doing something wrong. I wasn't certain what it was. I didn't look up the law, but I was interested in catching whoever was doing it.

Testimony of Griffin B. Bell, Hearing of March 20, 1978, p. 26.

Congress has also expressed its confidence in the ability of the courts to deal with national security issues. *See*, Title II of the Omnibus Crime Control and Safe Street Act of 1968, 18 U.S.C. § 2516(1)(a) and (c) and the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801.

The court below accepted the government's argument that adherence to the Fourth Amendment would frustrate the power to gather foreign intelligence because of the need for secrecy. *United States* v. *Truong*, 629 F.2d at 913. This claim, bluntly stated, is that the judiciary cannot be trusted with the information upon which the executive seeks to act. This reasoning is inapposite to a government of limited powers and separate functions. *Marbury* v. *Madison*, 1 Cranch 137 (1803). It was found

wanting in the domestic security context and there is no reason to give it greater credibility in the foreign national security situation.

Additionally, the argument that the time involved in obtaining a search warrant could cause disastrous harm to the national security is no reason for granting a broad-based exception to the warrant requirement. There has always been a narrow exception to that requirement for exigent circumstances. A warrantless search in an emergency situation involves questions not relevant to this case. This case, moreover, factually illustrates that any claimed "delay" which would have been necessary to obtain a warrant would not have harmed the national security. The FBI was closely watching Truong from at least September, 1976, yet electronic surveillance did not begin until May of 1977. Surely, there was time to obtain a warrant. Again, the argument of "delay" was raised and rejected in the domestic national security context; it is no stronger in the foreign national security area.

None of the reasons outlined above suggest that the warrant procedure "would actually fetter the legitimate intelligence gathering functions of the Executive Branch." *Zweibon* v. *Mitchell*, 516 F.2d at 651. In fact, a warrant procedure would have placed some appropriate limits on the broad, wide-ranging and massive invasion of privacy which resulted from the executive's unrestricted use of electronic surveillance. For this reason, amici believe that no wiretapping or bugging in the area of foreign affairs should be held exempt from prior judicial scrutiny.

Underlying the question of whether or not this Court should grant certiorari is the Foreign Surveillance Act of 1978, 50 U.S.C. § 1801, which was passed subsequent to the surveillance herein. The government may state in its argument against the granting of the writ of certiorari that the issues presented by this case are merely

of "historical" value because foreign national security surveillance is now governed by the new Act which supposedly requires a warrant.* This line of reasoning should be rejected by this Court. First, it omits from its calculation the within petitioner who received a 15-year jail sentence as a result of a conviction based upon the admission of unconstitutionally obtained evidence. Moreover, the type of warrantless surveillance legalized by the Fourth Circuit in this case may not come within the terms of the Foreign Surveillance Act. The Act, which contains a warrant procedure for certain types of surveillance, sets forth a criminal standard and requires that a person's activities "involve or may involve a violation of the criminal statutes of the United States." 50 U.S.C. § 1801(b)(2)(A). The Fourth Circuit, in upholding the surveillance in this case, authorized a broader non-criminal standard for warrantless surveillance, *i.e.*, surveillance "primarily" for intelligence gathering without the necessity of *any* criminal component. Thus, under the government's theory of this case and under the Fourth Circuit's holding, the President is likely to assert, despite the Foreign Intelligence Surveillance Act, that it is within his inherent power to authorize warrantless electronic surveillance for foreign intelligence purposes.

The decision below is particularly dangerous because it grants powers to the Executive which extend beyond those techniques related to electronic surveillance. The present Executive has asserted, for example, that the court established by the Foreign Surveillance Act does not have authority over executive authorizations of warrantless entries into people's homes, or what are sometimes

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* Such an argument assumes that the warrant requirement of the Act represents a change in the law. However, amici believe that the Foreign Intelligence Surveillance Act codifies well established principles which made no exception to the warrant requirement.

termed "black-bag" jobs. The President's pardonning of FBI officials Felt and Miller, who were convicted of engaging in such warrantless entries, further displays his belief that he can, under his "inherent" powers, legally approve such techniques. The Fourth Circuit decision is a strong signal to the President that he may, in fact, have such authority. In a period where a President seems bent on asserting claimed inherent powers, it is important for this Court to reassert the basic principle that the President is bound by those limitations on government set forth in the Constitution.

CONCLUSION

Those who founded this nation feared most the "abuse of executive authority" which was manifested by the hated general searches. Cooley, *Constitutional Limitations*, Vol. 1 (8th ed., 1927). It is of significance that they chose as a remedy the protection provided by a "neutral and detached magistrate" and that such a remedy was made part of the Constitution, *Coolidge*, 403 U.S. at 453. By enforcing the mandate of the Fourth Amendment, its very "point," being the Constitutional requirement of the prior approval of a "neutral and detached magistrate," this Court will be vindicating the historic role of the judiciary as the "impenetrable bulwark against every assumption of power" by the other branches of government. *Coolidge* v. *New Hampshire*. When one branch of government, no matter how powerful, attempts to "overleap the great barrier which defends the rights of the people," Madison, *Memorial and Remonstrance*, Vol. II, Writing of Madison 183-191 (G. Hunt ed., 1901), it is the solemn duty of this Court to repudiate such incursions into the freedoms; making this a "government of laws and not men."

For all of the above reasons, it is respectfully prayed that the writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

October 30, 1981

Michael D. Ratner, Esq.
Center for Constitutional Rights
853 Broadway
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New York, N.Y. 10003

Re: *Truong Dinh Hung* v. *United States*
No. 81-631

Dear Mr. Ratner:

In response to your letter of October 26, 1981, I hereby consent, on behalf of the United States, to the filing by your client of a brief amicus curiae in support of the petition for certiorari in the above-entitled case.

Sincerely,

REX E. LEE
Solicitor General

October 26, 1981

EXPRESS MAIL

Michael Ratner, Esq.
Center for Constitutional Rights
853 Broadway
New York, N.Y. 10003

Re: *United States* v. *Truong*, *S.Ct. No. 81-631*

Dear Mr. Ratner:

On behalf of David Truong, petitioner in the above-referenced matter, we hereby consent to the filing of a brief in support of the petition, as an *amicus curiae*, by the Center for Constitutional Rights.

Sincerely,

JOHN J. PRIVITERA

Amicus Brief

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FILED
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ALEXANDER L. STEVAS,
CLERK

No. 81-631

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

TRUONG DINH HUNG,
Petitioner,

v.

UNITED STATES OF AMERICA,

BRIEF OF NATIONAL ALLIANCE AGAINST RACIST AND POLITICAL REPRESSION AND OTHERS AS AMICI IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

TRUONG DINH HUNG,

Petitioner,

v.

UNITED STATES OF AMERICA.

BRIEF OF NATIONAL ALLIANCE AGAINST RACIST AND POLITICAL REPRESSION AND OTHERS AS *AMICI* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATEMENT OF INTEREST

The National Alliance Against Racist and Political Repression, together with the undersigned organizations and individuals, submit this *amicus curiae* brief, with the consent of the parties hereto, because of the serious issues of fundamental rights and liberties presented by this petition.[1] Your *amici* urge this Court to grant the writ prayed for in order to review and consider the dangerous precedents of this prosecution and the opinions below, as they will adversely affect the interests of many persons well beyond the petitioner.

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[1]For a complete listing of *amici*, see Appendix annexed hereto. Consents of the parties are on file with the Court.

This case represents an effort by the prosecution to extend, beyond all constitutional limitations, the "inherent power" of the Executive to investigate and prosecute in the name of "national security" and "foreign intelligence." Congress never intended the Espionage Act to reach the conduct at issue in this case, and the Bill of Rights prohibits such a reach.[2] This Court has the power and the duty to prevent the usurpation of power by the Executive branch of government and to safeguard individual rights and liberties. Accordingly, your *amici* urge this Court to review this case.

The prosecution of David Truong stands as a frightening attempt to chill, under threat of espionage charges, all future international activity that would challenge, scrutinize or even disseminate information concerning United States foreign policy or military involvement, be it in Southeast Asia, Latin America, the Middle East, Africa or Europe. As organizations and individuals dedicated to public debate on issues of world peace, disarmament, self-determination for developing nations and international human rights, many of your *amici* perceive a direct threat from this prosecution.

The use of the espionage offense and persecution of the foreign-born have long stood in direct proportion to the scope of repression in society. History is a harsh critic of efforts to expand this scope.[3] This Court is asked to review the instant effort.

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[2]See discussion, *infra* at Point I.

[3]See e.g., J.M. Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* (1956); G.L. Joughin & E.M. Morgan, *The Legacy of Sacco and Vanzetti* (1948); W. & M. Schneir, *Invitation to an Inquest* (1965).

If David Truong may be exposed to the harshest penalties exacted in the Federal Criminal Code for exchanging political and economic information with foreigners, for the purpose of advancing normalization of post-war relations with Vietnam, when such information was publicly available and unrelated to U.S. military matters, then the fundamental rights to speak, to hear, to associate, to gather information, to publish, to report, to know and to hold the government accountable for its acts, are in jeopardy for all.

STATEMENT OF FACTS

David Truong, a Vietnamese citizen, entered this country in 1965 at the age of nineteen (19) years and attended Stanford University. His family remained in Saigon. In 1967 David's father ran for president of Vietnam as a peace candidate. Calling for a negotiated political settlement to end the war, he received 47% of the vote. Within weeks after his narrow defeat he was tried and sentenced to five years imprisonment for his "political offenses."

Truong, aware of his family's circumstances as well as the suffering of the people of his country, turned a major portion of his time and effort to obtain the release of his father and other political prisoners in South Vietnam. Further, he joined with the people of this country in seeking to bring an end to the war and the withdrawal of all United States military forces.

In 1975, after the termination of hostilities in Vietnam, Truong helped form the Vietnamese-American Reconciliation Center to assist the thousands of refugees coming to the United States. This center also sought to disseminate information which would encourage the establishment of diplomatic relations between the United States of America and the Socialist Republic of Vietnam.

From 1967, David Truong was publicly engaged in these activities. He was well-known to journalists,

scholars, members of Congress, and other United States government officials here and abroad. Truong used his skills as a researcher to gather and disseminate information, books, articles, reports and other materials in furtherance of these activities. He became a public figure, wrote in several leading periodicals, spoke at public meetings in all sections of the country, and appeared on radio and television.

Truong had friends in Paris, France, which was a home for many exiles from the Saigon government. They, too, were engaged in disseminating information in support of normalization between Vietnam and the United States. There were frequent exchanges of information between them.

Among the material gathered by Truong was information and documents that he received from Ronald Humphrey. He had no reason to believe, nor did the documents he received reflect, that such information or documents were secret, classified or related to the national defense of the United States. The material he received from Humphrey were copies of diplomatic and economic information principally in the form of cable traffic from American consular offices in Southeast Asia, from which the classification and organization markings had been removed.

None of the documents received from Humphrey related to United States military designs or capabilities. Rather, the information essentially amounted to reports and assessments by low-level diplomatic personnel of the "political situation" and internal developments in Vietnam, Thailand, Laos and China—facts that, for the most part, all parties concede were otherwise known or available to Vietnam, and had been extensively reported upon in the New York Times, Washington Post, Wall Street Journal, Newsweek Magazine, The Christian Science Monitor, Peking Review, Bangkok World, Asia Week, Far Eastern Economic Review, and other journals and periodicals.

Truong forwarded the material he collected, including that received from Humphrey, in an open manner. In most instances, he sent the information to Vietnamese scholars in Paris, by regular mail, or through friends who were in transit between the United States and Europe. There has been no allegation or evidence that Truong ever forwarded this information by secret, clandestine, or covert methods.

As a consequence of his lawful public activities, Truong became a subject of extensive surveillance and investigation by the FBI and CIA, the tainted fruits of which formed the basis of the instant prosecution.[4]

At the trial, the prosecution blurred all distinction between national defense and foreign relations. The government's witnesses relied heavily upon the fact that the cables Truong transferred were classified, as a means to suggest their defense-relatedness and Truong's purported intent to advantage a foreign nation.

The defense presented testimony establishing that none of the cables related to the national defense of the United States; none of the cables were properly classified; none of the cables offered an advantage to a foreign nation or an injury to the defense of the United States; and all of the substantive information in the cables was in the public domain, much of it having been released by the government itself and reported in the national and world press.

The trial court adopted the government's theory in its rulings on evidence and its instructions to the jury. Truong was convicted in a web of six (6) interrelated and complex

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[4]For a full discussion of the Fourth Amendment issues on appeal herein, see the Petition, together with *amicus curiae* briefs of the Center for Constitutional Rights and the American Civil Liberties Union. Your *amici* concur with the arguments and reasoning contained therein and incorporate same by reference in their brief.

offenses, including espionage [18 U.S.C. §794(a)]; conspiracy to commit espionage [18 U.S.C. §794(c)]; unlawful transmission of defense information [18 U.S.C. §793(e)]; theft of government information [18 U.S.C. §641]; acting as a foreign agent without notifying the Secretary of State [18 U.S.C. §951]; and conspiracy to violate 18 U.S.C. §641, 50 U.S.C. §783(b) and (c) [18 U.S.C. §371]. He was sentenced to fifteen (15) years imprisonment and remains on bail at this time. *United States v. Truong*, 439 U.S. 1326 (1978).

GROUNDS FOR GRANTING THE WRIT

I

THE INSTANT APPLICATION OF THE ESPIONAGE STATUTES REPRESENTS AN ABUSE OF EXECUTIVE POWER AND A VIOLATION OF FIRST AMENDMENT RIGHTS

National Defense Information: Military Matters or Foreign Relations?

The Espionage Act, 18 U.S.C. §792 *et seq.*, its legislative history and the cases construing it, argue eloquently that criminal sanctions are to be directed only at those who intentionally transfer information directly related to secret military matters and functions.[5] Yet the trial court in this case effectively extended the Espionage Act to unconstitutional proportions by refusing to instruct the jury that "national defense" is limited to military mat-

[5]For a complete analysis of the various espionage statutes see H. Edgar & B. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 Column L. Rev. 929 (1973) (hereafter referred to as "Edgar & Schmidt"); see also M. Nimmer, *National Security Secrets v. Free Speech: The Issues Left Undecided by the Ellsberg Case*, 26 Stan. L. Rev. 311 (1974) (hereinafter referred to as "Nimmer").

ters, as distinct from "foreign relations."[6] The trial court further erred by failing to instruct the jury that the public availability of the *information* transferred is a full and complete defense to espionage.[7]

Congress never intended the Espionage Act to prohibit transfers of political and economic information related to foreign affairs, only military information "related to the national defense"—an important distinction which has been repeatedly noted by all branches of the government in related contexts.[8] Leading commentators, Edgar & Schmidt, at 985, explain as follows:

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[6]All previous prosecutions under the espionage statutes have involved allegedly clandestine transfers of military information that offered a clear adantage to U.S. defense capabilities, see e.g., *United States v. Boyce*, 594 F.2d 1246 (9th Cir.), *cert. denied*, 444 U.S. 855 (1980) (top secret CIA materials concerning covert satellite data); *United States v. Dedeyan*, 584 F.2d 36 (4th Cir. 1978) (NATO resupply); *Gorin v. United States*, 312 U.S. 19 (1941) (Naval Intelligence concerning war vessels and related matters); *United States v. Drummond*, 354 F.2d 132 (2nd Cir. 1965), *cert. denied*, 384 U.S. 1013 (1966) (Naval warship data: military files); *United States v. Soblen*, 301 F.2d 236 (2d Cir.) *cert. denied*, 370 U.S. 944 (1962) (OSS data in wartime, weapons systems); *Slack v. United States*, 203 F.2d 152 (6th Cir.) *cert. denied*, U.S. 888 (1953) (munitions data).

[7]*United States v. Heine*, 151 F.2d 813, 815-6 (2d Cir. 1945) (L. Hand), *cert. denied*, 328 U.S. 833 (1946) See also *Gorin v. United States, supra*, 328 U.S. at 28. Edgar & Schmidt, *supra* at 974-86.

[8]See Executive Order 11652; Executive Order 12065 (Section 6-104); 5 U.S.C. §552 (Freedom of Information Act); *Environmental Protection Agency v. Mink*, 410 U.S. 73, 81 (1973). The State Department, whose United States Information Agency was the source of the documents in issue, is charged with foreign relations, not national defense duties, see Executive Order 11905.

> "(W)e doubt that the drafters of the Espionage Act envisaged that enhancement of foreign relations by protecting foreign confidences not directly linked to military affairs 'related to the national defense'."

Similarly, in testimony before Congress, former Attorney General Griffin B. Bell had occasion to outline the proper relationship of diplomatic material to the espionage statutes:[9]

> "... (u)nder the espionage laws, as I understand it, they restrict it to defense material, and some of this is not defense material. Some are documents that have something to do with the State Department, with diplomatic matters."

Further, despite the "obvious and unarguable" governmental interest in maintaining the defense and security of the nation, the First Amendment prohibits the expansive and imprecise scope of the Espionage Act adopted by the prosecution and the courts below.[10] The Espionage Act directly regulates the content and subject matter of information which may be gathered and disseminated. Accordingly, it is "aimed at communicative impact" and "presumptively at odds with the first amendment."[11] Only the

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[9]*Foreign Intelligence Surveillance Act of 1978; Hearing on S.1566 Before the Subcomm. on Intellignce and the Rights of Americans of the Select Committee on Intelligence,* 95th Cong., 2d Sess. 12 (1977-78) (Testimony of Griffin B. Bell).

[10]*Aptheker v. Secretary of State,* 378 U.S. 500, 509 (1964): *NAACP v. Hutton,* 371 U.S. 415 (1963); *Shelton v. Tucker,* 364 U.S. 479 (1960); *Nimmer, supra* at 328; see also 64 Stat. 987 (1950) for the legislature's statement that the Espionage Act is not to be interpreted or applied in a manner that would infringe upon First Amendment rights.

[11]L.H. Tribe, *American Constitutional Law* (1978), §12-3 *et seq.* at p. 581.

most compelling reason and narrow exception (*i.e.* a clear and present danger) may justify the Government's instant effort to regulate, by severe criminal sanctions, the free flow of political and economic information that is vital to public debate and concededly in the public domain. The Government has failed to offer such a justification.

In *United States v. Robel*, 389 U.S. 258, 264 (1967), the court held:

> "(T)his concept of "national defense" cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term "national defense" is the notion of defending these values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile."

Your *amici* include organizations and individuals in the United States who are dedicated to an open and constitutionally-protected exchange of political, economic and publicly available military information with other organizations and individuals in the United States and throughout the world. The suggestion, inherent in this case, that the Executive is authorized to categorically prohibit such activity under its broad interpretation of the Espionage Act offends the letter and the spirit of the Constitution. In achieving its legitimate goal, the Executive is

constrained by the mandate of Congress[12] and limited to more precise means which have a " 'less drastic' impact on the continued vitality of First Amendment freedoms."[13]

The Improper Use of Classification

At the trial of the instant matter, the Government relied heavily upon the classified status of the documents and cables in issue.[14] The trial court embraced the prosecution's emphasis by instructing the jury that the classified status of the information transferred established an element of certain offenses charged and amounted to a decisive factor to certain elements of the remaining offenses.

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[12]See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); Junger, *Down Memory Lane: The case of the Pentagon Papers*, 23 Case W. Res L. Rev. 3, 18 *et seq.* (1971); see also *United States v. Nixon*, 418 U.S. 683 (1973) reaffirming *Marbury v. Madison*, 5 U.S. 1 Cranch 137, 177 (1803) that "(i)t is emphatically the province and duty of the judicial department to say what the law is."

[13]*United States v. Robel, supra*, 389 U.S. at 268, fn 20; *United States v. Brown*, 381 U.S. 437, 461, (1965); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964); *Stromberg v. California*, 233 U.S. 359, 369 (1931); *United States v. Congress of Industrial Organizations*, 335 U.S. 106, 141-142 (1948); *Shelton v. Tucker, supra;* see also, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464 (1964).

[14]Prosecution witnesses Foresman and Quinn made frequent reference to the significance of the classification of the cables in issue. However, it is undisputed that with few exceptions the cables were designated "confidential"—the lowest and most common designation. Further, defense expert Halperin testified that most of the cables were improperly classified and otherwise released by the Government.

More particularly, the trial court instructed the jury that counts two, four and five of the indictment, charging violations of 18 U.S.C. §641 and 18 U.S.C. §371, required that the "information communicated have been of a kind classified by the President or by the head of a department or agency with the approval of the President as affecting the security of the United States."[15]

On espionage counts one and three of the indictment, charging violations of 18 U.S.C. §794, the trial court instructed the jury that the classification of the documents was a "factor to be considered" on the elements of intent (i.e., whether the document could be used to injure the United States or to advantage a foreign nation) and on whether the information "related to the national defense."[16] On espionage count seven, charging a violation of 18 U.S.C. §793(e), the trial court indicated that the fact of classification was decisive on the question of the defendant's "authorized possession" and entitlement to the information and again relevant to the information's defense-relatedness.[17]

Most significantly, the jury was adamantly and repeatedly directed that, for purposes of all counts of the indictment, they were not to consider the propriety of any classification, despite extensive defense testimony on the subject.[18]

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[15]Trial Court Charge to the Jury (hereinafter referred to as "Charge"), at 14-17.

[16]Charge, at 34-38.

[17]Charge, at 48-50.

[18]Charge, at 15, 37.

By withdrawing the propriety of classification from the jury's consideration, the trial court effectively shifted the Government's burden of proof on certain elements of the offenses charged. Further, the trial court aided the Government by creating certain unreasonable irrebutable presumptions and inferences—that classified material is properly classified; that classified information necessarily relates to the national defense; that the dissemination of classified information will necessarily injure the United States or advantage a foreign nation; and that knowing possession of classified information is criminal unless "authorized" by the classification system.

Such an approach violates the fundamental principal that the Government "must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other ingredients of the offense."[19] Further, it offends due process and the Fifth Amendment by denying one who had no part in the classification process the opportunity to review and rebut the propriety of any classification introduced against him by the Government.[20]

Classification is an Executive procedure by which millions of documents, relating to a broad variety of infor-

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[19]*Patterson v. New York*, 432 U.S. 197, 215 (1977); see also *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970); *McFarland v. American Sugar Refining Co.*, 241 U.S. 79, 86 (1916).

[20]See *Estep v. United States*, 327 U.S. 114, 122 (1946).

mation, are declared secret.[21] Information relating to the national defense is but one small part of the vast quantity of material which may be and is classified.[22] Consequently, classification is an unreliable and highly suspect indicator of whether information is defense-related or whether it can be used to injure the United States or advantage a foreign nation.

However, if classification is nevertheless deemed probative and admissible to establish the elements of espionage, it was prejudicial error for the trial court to fail to advise and instruct the jury that "the Government can and does maintain secrecy (i.e. classify information) as to a substantial number of matters which have no relation to the national defense."[23] Further, it was error for the trial court to criminalize communications of defense-related information to persons not "entitled to receive it" pursuant

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[21]For a general discussion of the history of Executive classification see *Developments in the Law—The National Security Interest and Civil Liberties*, 85 Harv. L. Rev. 1130, 1189-1243 (1972); Parks, *Secrecy and the Public Interest in Military Affairs*, 26 Geo. Wash. L. Rev. 23, 46-77 (1957); see also *U.S. Government Information Policies and Practices—the Pentagon Papers, Hearings before a Subcomm. of the House Comm. on Government Operations*, 92nd Congress, 1st Sess. (1971) for a criticism of overclassification; see The New York Times, October 16, 1981 at p. A-22 and October 22, 1981 at p. B-19 for the Reagon Administration's controversial proposals to expand the classification system and to restrict the Freedom of Information Act by Executive Order.

[22]See Executive Order 12065 (Section 1-301) which provides for seven (7) broad catagories of information which may be considered for classification. National defense information appears to be covered in a single catagory ("military plans, weapons and operations").

[23]Edgar and Schmidt, *supra*, at 985, 1084-5.

to the Executive classification system, since Congress has repeatedly rejected such an approach.[24]

In summary, the trial court's imprecise and confusing charge to the jury on the complex, multi-count indictment at issue herein failed to satisfy the essential purpose of Rule 30 of the Federal Rules of Criminal Procedure. The trial court's instructions on classification amounted to a judicial enactment of an "Official Secrets Act," and effectively criminalizes civilian disclosures of any classified information. Congress has expressly refused to adopt such a measure, reserving for itself and the Judiciary the power to check Executive secrecy.[25] It offends your *amici's* sense of justice that the prosecution of David Truong resembled a prosecution before the courts of repressive regimes in other

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[24]See Edgar and Schmidt, *supra*, at 1050-1057.

[25]See *National Security Secrets and the Administration of Justice, Report of Senate Select Committee on Intelligence, Subcomm. on Secrecy and Disclosure*, 95th Cong., 2nd Sess. (1978). For a full discussion of Congressional and Judicial power to oversee classification, see C. Nesson, *Aspects of the Executive's Power Over National Security Matters: Secrecy, Classifications and Foreign Intelligence Wiretaps*. 49 Indiana L. J. 399, 399-411 (1973-4); M. Halperin and D. Hoffman, *Secrecy and the Right to Know*, 40 Law and Contemporary Problems 132 (1976); E.W. Welch, *Classified Information and the Courts*, 31 Fed. Bar J. 358 (1972).

countries whose respect for justice falls far short of our heritage.[26]

II

THE SECRECY OF THE REMAND PROCEEDING REPRESENTS AN ABUSE OF JUDICIAL POWER

At the trial of this action, the prosecution failed to make full and timely disclosure pursuant to 18 U.S.C. §3500, (*Jencks* Act), *Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972). A substantial portion of the documents were belatedly given to the trial court, after the paid informant witness had left the stand, and they were not made available to the defendants on the grounds of "national security" and "classification". The prosecution explained at the time that certain other highly relevant documents were either missing or destroyed.

On remand from the Court of Appeals, *United States v. Truong*, 629 F.2d 908 (4th Cir. 1980), the trial court made no further inquiry into the missing or allegedly destroyed

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[26]See e.g., Statutes of the Republic of South Africa—Defense—Official Secrets Act, No. 16 of 1956, which provides that a civilian is presumed guilty of espionage if he transfers "useful" information to a "foreign agent." The maximum sentence for violation of the act is fifteen (15) years. But see *State v. Mavais*, South African Law Reports, 1971 (1) SA 844 (AD) (Translation), which establishes a full and complete defense if the information transferred is in the public domain. Truong was even denied a clear instruction from the trial court on this defense (see discussion, *supra*.).

documents. Nor did the trial court question the CIA's repeated opportunity to tamper with these documents.[27]

In September 1980, the trial court purportedly reviewed the 540 remand documents in an *ex parte, in camera* proceeding, over the strenuous objections of defense counsel.[28] On October 1, 1980 the trial court released thirty (30) documents to defense counsel, "sanitized" and under a strict protective order. The court refused to turn over the remaining 510 documents claiming that they did not constitute *Jencks* material. The trial court then sealed the pleadings and ordered that briefs concerning the impact the thirty (30) documents would have had on the trial if they had been produced in a timely manner, be filed *in camera* and not shown to the defendants. The trial court later ruled that the prosecution's failure amounted to "harmless error".[29]

Your *amici* contend that the prosecutorial misconduct and judicial error below taken together cast a sad taint upon this proceeding. The belated production, the conve-

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[27]The CIA had custody of the documents throughout the proceedings, purportedly for purposes of storing and transporting same. This access to the documents does not even conform to the procedures for maintaining the security of classified information in a federal. criminal proceeding, promulgated by the Chief Justice of the Supreme Court on February 12, 1981.

[28]The *ex parte* procedure used by the court below would be prohibited under the new Classified Information Procedures Act ("Graymail Bill"), 94 Stat. 2025 (1980). Section 6 of the Bill provides for an *in camera* hearing on the admissibility of classified information but prohibits any *ex parte* proceeding. See S. Rep. 823, 96th Cong. 2d Sess. reprinted in *U.S. Code Cong. & Admin. News*, Pamphlet 10A, 7744-5 (1980). For a criticism of *in camera* proceedings see *Dennis v. United States*, 384 U.S. 855, 873-5 (1966).

[29]See Petition, Appendix C.

nient destruction, the CIA access, the unprecedented *ex parte, in camera* review, the meager release of thirty (30) "sanitized" documents under an unwarranted protective order, the 510 documents remaining undisclosed, and the sealed briefs and pleadings, all amount to a cloak of secrecy that violated the petitioner's Sixth Amendment rights of confrontation and the public's right of access and accountability.[30]

It is urged that the court grant the writ prayed for herein in order to review the conduct of the trial court and the integrity of the remand proceeding below.

CONCLUSION

For reasons of law, morality, and decency, it is respectfully prayed that the writ of certiorari be granted.

Respectfully submitted,

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[30] *Richmond Newspapers, Inc. v. Virginia*, —U.S.—, 100 S.Ct. 2814 (1980); *Gannett Co. Inc. v. DePasquale*, 443 U.S. 368 (1979); *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976).

APPENDIX

Organizations:

Association of Arab-American University Graduates, Inc., Belmont, Massachusetts

Committee in Solidarity with the People of El Salvador, Washington, D.C.

Fund for Open Information and Accountability, Inc. (F.O.I.A., Inc.), New York, New York

Labor Research Association, Inc., New York, New York

Middle East Research & Information Project, Inc., Washington, D.C.

National Anti-Imperialist Movement in Solidarity with African Liberation, New York, New York

National Committee Against Repressive Legislation, Los Angeles, California

National Conference of Black Lawyers, New York, New York

Women for Racial and Economic Equality, New York, New York

Women's International League for Peace and Freedom, Philadelphia, Pennsylvania

Women's Strike for Peace, Washington, D.C.

Unitarian Universalist Association of North America, Washington, D.C.

United States Peace Council, New York, New York

War Resisters League, New York, New York

Individuals:

Rev. Charles Bridy, Washington Office Director New Democratic Coalition, Washington, D.C.

W. Haywood Burns, Esq., Acting Dean/Vice-Provost, Urban & Legal Programs, City College of New York, New York

Terence Cannon, author, *Revolutionary Cuba*

Frank J. Donner, Esq., author *The Age of Surveillance*, New York, New York

Joseph Eldridge, United Methodist Minister, Washington, D.C.

Stanley Faulkner, Esq., chair, U.S. Lawyers Committee on Korea, New York, New York

Rev. David Garcia, St. Mark's Church-in-the-Bowery, New York, New York

Lennox S. Hinds, Esq., Permanent Representative to the United Nations, International Association of Democratic Lawyers, New York, New York

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Deborah A. Jackson, Esq., Vice President, American Association of Jurists, New York, New York

Don Luce, South East Asia Resource Center, New York, N.Y.

Rev. Paul Mayer, New York Theological Seminary, chair, Mobilization for Survival, New York, New York

Leora Mosston, Esq., New York, New York

Hope R. Stevens, Esq., New York, New York

Dr. James J. Zogby, Executive Director American-Arab Anti-Discrimination Committee, Washington, D.C.